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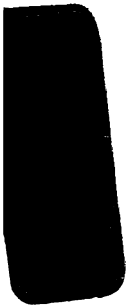

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REPORTS OF CASES

ARGUED AND ADJUDGED

IN THE

SUPREME COURT

OF THE

UNITED STATES,

FEBRUARY TERM 1818.

By HENRY WHEATON,
COUNSELLOR AT LAW.

VOL. III.

FOURTH EDITION.

EDITED, WITH NOTES AND REFERENCES TO LATER DECISIONS,

BY

FREDERICK C. BRIGHTLY,
AUTHOR OF THE "FEDERAL DIGEST," ETC.

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JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES,

DURING THE PERIOD OF THESE REPORTS.

Hon. JOHN MARSHALL, Chief Justice.

" BUSHROD WASHINGTON,
" WILLIAM JOHNSON,
" BROCKHOLST LIVINGSTON,
" THOMAS TODD,
" GABRIEL DUVALL,
" JOSEPH STORY,

} Associate Justices.

WILLIAM WIRT, Esq., Attorney-General, appointed November 13th, 1817.

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OF THE

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CASES DETERMINED

IN THE

SUPREME COURT OF THE UNITED STATES.

FEBRUARY TERM, 1818.

JACKSON, *ex dem.* THE PEOPLE OF THE STATE OF NEW YORK, *v.* CLARKE.

Power of alien to hold lands, under the treaty with Great Britain.

G. C., born the colony of New York, went to England in 1738, where he resided until his decease; and being seised of lands in New York, he, on the 30th of November 1776, in England, devised the same to the defendant and E. C. as tenants in common, and died so seised, on the 10th December 1776; the defendant and E. C. having entered and becoming possessed, E. C., on the 3d December 1791, bargained and sold to the defendant all his interest. The defendant and E. C., were both born in England long before the revolution. On the 22d March 1791, the legislature of New York passed an act to enable the defendant to purchase lands, and to hold all other lands which he might then be entitled to, within the state, by purchase or descent, in fee-simple, and to sell and dispose of the same, in the same manner as any natural born citizen might do. The treaty between the United States and Great Britain of 1794, contains the following provision: "Article 9th. It is agreed, that British subjects who now hold lands in the territories of the United States, and American citizens who now hold lands in the dominions *of his majesty, shall continue to hold them, according to the nature and tenure of their respective [*2 estates and titles therein; and may grant, sell or devise the same, to whom they please, in like manner as if they were natives, and that neither they, or their heirs or assigns, shall, so far as respects the said lands and the legal remedies incident thereto, be considered as aliens." The defendant, at the time of the action brought, still continued to be a British subject. *Held*, that he was entitled to hold the lands so devised to him by G. C., and transferred to him by E. C.[1]

ERROR to the Circuit Court for the district of New York. This was an action of ejectment, commenced in the supreme court of the state of New York, and removed thence into the circuit court of the United States for the New York district, where, in September 1815, a trial was had, and a special verdict found, in the words following, to wit:

At which day, in this same court, at the city of New York, in the New York district, came the parties aforesaid, by their attorneys aforesaid, and the jurors aforesaid being called, also come, who to say the truth of the

[1] See Watson *v.* Donnelly, 28 Barb. 653.

above contents, being elected, tried and sworn, say, upon their oath, that long before the above-mentioned time when the trespass and ejectment above mentioned are supposed to have been committed, namely, on the tenth day of April 1706, Anne, Queen of England, by letters-patent under the great seal of the then colony of New York, did grant unto Sampson Broughton, and divers other persons in the said letters-patent named, and their heirs, a certain tract of land, situate in the then colony, now state of New York, to have and to hold the same, to them, their heirs and assigns, for
*3] ever, as tenants in common, *and not as joint-tenants. And that the lands and tenements, with their appurtenances, specified in the foregoing declaration of the said James Jackson, were part and parcel of the said tract of land granted, as aforesaid, by the said letters-patent.

And the jurors aforesaid, upon their oath aforesaid, further say, that the said Sampson Broughton and the said other persons to whom the said tract of land was granted as aforesaid, by the said letters-patent, being so seised in fee-simple, and possessed of the said tract of land, by virtue of the said letters-patent, did, afterwards, to wit, on the 12th day of April, in the year last aforesaid, by good and sufficient conveyance and assurance in the law, for a valuable consideration, grant, bargain, sell and convey unto George Clarke, now deceased (who was formerly lieutenant-governor of the said colony, and who was then a subject of England, and who remained so until the time of his death), and to his heirs, one equal undivided ninth part of the said tract of land, granted as aforesaid, in and by the said letters-patent, to have and to hold to him, his heirs and assigns for ever.

And the jurors aforesaid, upon their oath aforesaid, further say, that partition of the said tract of land mentioned in the said letters-patent was, afterwards, to wit, in the year last aforesaid, made in due form of law, between the last aforesaid George Clarke, and the other proprietors of the said tract of land mentioned and granted in and by the said letters-patent. And that by virtue of the said partition, the last aforesaid George Clarke became, and was sole seised in fee-simple, and possessed of the lands and tenements, with the appurtenances, specified in the said declaration of the
*4] said James Jackson, *and continued to be so seised and possessed thereof, until the time of his death. And that the last aforesaid George Clarke died, so seised and possessed, in the year 1759.

And the jurors aforesaid, upon their oath aforesaid, further say, that George Clarke, who was late secretary of the colony of New York, was the eldest son and heir-at-law of the before mentioned George Clarke, formerly lieutenant-governor as aforesaid. And that upon the death of the said George Clarke, formerly lieutenant-governor as aforesaid, the said George Clarke, late secretary as aforesaid, as son and heir as aforesaid, entered upon, and was seised in fee-simple, and possessed the lands and tenements, with the appurtenances, specified in the said declaration of the said James Jackson. And being so seised and possessed, did, afterwards, to wit, on the 30th day of November 1776, at Hyde, in the county palatine of Chester, in the kingdom of Great Britain, make and publish, in due form of law to pass real estate, his last will and testament, and did thereby devise unto his grand-nephews, the said George Clarke, the defendant in the said declaration named, and Edward Clarke, and to their heirs and assigns, as tenants in common, and not as joint-tenants, the lands and tenements in the said decla-

ration specified, with the appurtenances. And the jurors aforesaid, upon their oath aforesaid, further say, that the said George Clarke, late secretary as aforesaid, afterwards, to wit, on the 10th day of December 1776, at Hyde aforesaid, in the said county palatine of Chester, in the said kingdom of Great Britain, died, so seised and possessed as aforesaid, and without having altered or revoked his said last will and *testament.

[*5 And the jurors aforesaid, upon their oath aforesaid, further say, that upon the death of the said George Clarke, late secretary as aforesaid, the said George Clarke, the said defendant, and the said Edward Clarke, claiming under the said last will and testament, entered upon and became possessed of, the said lands and tenements, with the appurtenances, in the said declaration specified. And the said George Clarke, the said defendant, and the said Edward Clarke, being actually possessed of the said lands and tenements, with the appurtenances, in the said declaration specified, as under the said last will and testament, the said Edward Clarke, did, afterwards, to wit, on the 23d day of December 1791, by a deed of bargain and sale, duly executed, grant, bargain and sell, for a valuable consideration, to the said George Clarke, the said defendant, and his heirs, one equal moiety of the said lands and tenements, with the appurtenances, in the said declaration specified, and all the estate and interest of the said Edward Clarke, in and to the said lands and tenements last aforesaid, with the appurtenances, to have and to hold the same to the said George Clarke, the said defendant, his heirs and assigns; by reason whereof, the said George Clarke, the said defendant, entered upon, and became, and was, actually possessed of the said lands and tenements, with the appurtenances, in the said declaration specified, claiming to be seised thereof in fee-simple, and so continued until the entry of the People of the State of New York, hereafter mentioned.

[*6 And the jurors aforesaid, upon their oath aforesaid, further say, that the said George Clarke, *late secretary as aforesaid, was born in the city of New York, in the late colony, now state of New York, and that in the year 1738, he went to that part of Great Britain, called England, and thenceforth continued to live and reside there, on his family estate, until and at the time when he made and published his said last will and testament, and ever after and until and at the time of his death. And the jurors aforesaid, upon their oath aforesaid, further say, that on the 4th day of July, in the year 1776, the late colony of New York, together with the other colonies of Great Britain, in North America, now called the United States of America, declared themselves free and independent States, and that from that day to the first day of September, in the year 1763, the said United States, and the citizens thereof, were at open and public war with the king of Great Britain and his subjects. And the jurors aforesaid, upon their oath aforesaid, further say, that the said George Clarke, the said defendant, was born in England, on the 28th day of April, in the year 1768. And that the said Edward Clarke was born in England, on the 28th day of November, in the year of our Lord 1770. And that the said George Clarke, the said defendant, and the said Edward Clarke, were born British subjects.

And the jurors aforesaid, on their oath aforesaid, further say, that the said George Clarke, late secretary as aforesaid, died without issue, and that at the time of his death, one George Hyde Clarke was his nephew; and that the said George Hyde Clarke, if he is capable of inheriting the real estate

of the said *George Clarke, late secretary as aforesaid; within the state of New York, is the heir-at-law of the said George Clarke, late secretary as aforesaid, and that the said George Hyde Clarke was born in Great Britain, before the 4th day of July, in the year 1776, and hath ever since resided, and still doth reside, in Great Britain, and is still living; and that no other person than the said George Hyde Clarke, is, or can be, the heir-at-law of the said George Clarke, late secretary as aforesaid; and that the said George Hyde Clarke is capable of inheriting the real estate of the said George Clarke, late secretary as aforesaid, within the state of New York, unless he is incapable of inheriting such real estate, by reason of his having been born, and having resided in, Great Britain as aforesaid.

And the jurors aforesaid, on their oath aforesaid, further say, that on the 8th day of February, in the year 1791, the said George Clarke, the said defendant, caused to be presented to the legislature of the state of New York, a petition, in the words following, to wit:

To the honorable the senate and assembly of the state of New York, in legislature convened: The petition of George Clarke, humbly showeth, that your petitioner was born in England, and is great-grandson of George Clarke, formerly lieutenant-governor of New York; that he resided in the city of New York for about a year preceding the month of October last, with intention, at the end of two years, to have been naturalized under the statute of the United States; that he was unexpectedly called abroad on important
*8] business, but expects to return in the course of the *ensuing summer; and as his naturalization must now be unavoidably suspended, to the great embarrassment of his affairs, your petitioner humbly prays that his name may be inserted in the bill now before the honorable the legislature, to grant a similar privilege of holding lands within this state, notwithstanding the want of naturalization, and your petitioner shall ever pray, &c.

GEORGE CLARKE,
By Goldsb. Banyar and Jas. Duane, his attorneys.

And the jurors aforesaid, upon their oath aforesaid, further say, that on the 22d day of March, in the year 1791, an act was passed by the legislature of the state of New York, in the words following, to wit:

"An act to enable Francois Christophe Mantel, and the several other persons therein named, to purchase and hold real estates within this state. Be it enacted by the poople of the state of New York, represented in senate and assembly, and it is hereby enacted by the authority of the same, that it shall and may be lawful for Francois Christophe Mautel, Samuel Clows, junior, Samuel Richardet, William Robert O'Hara, Erick Glad, George Turnbull, Thomas Mounsey and Jan Barnhard, respectively, to purchase lands, tenements and hereditaments, within this state, and to have and hold the same to them, respectively, and their respective heirs and assigns for ever, as fully, to all intents and purposes, as any natural-born citizen may or can do, any law, usage or custom to the contrary notwithstanding. And be it
*9] further enacted by the authority aforesaid, that it *shall and may be lawful for George Clarke, who is great-grandson of George Clarke, formerly lieutenant-governor of New York, to purchase any lands, tenements or hereditaments, within this state, and to have and to hold the same, and all other lands, tenements and hereditaments which he may now be

entitled to, within this state, by purchase or descent, to him the said George Clarke first above named, his heirs and assigns, to his and their own proper use and behoof for ever, and to sell and dispose of the same, or any part thereof, as fully, to all intents and purposes, as any natural-born citizen may or can do, any law, usage or custom to the contrary notwithstanding."

And the jurors aforesaid, on their oath aforesaid, further say, that the said George Clarke, the said defendant, and the said George Clarke, great-grandson of George Clarke, formerly lieutenant-governor of New York, mentioned in the said act, is one and the same person.

And the jurors aforesaid, on their oath aforesaid, further say, that on the first day of May, in the year 1810, the said George Clarke, the said defendant, was in the actual possession and occupation of the said lands and tenements, in the said declaration specified, with the appurtenances, and that on the day and year last aforesaid, the said People of the State of New York, lessors of the said James Jackson, entered into the said tenements, with the appurtenances, and from thence put out and removed the last aforesaid George Clarke, and were seised therof as the law requires; and being so seised thereof, the said People, on the day and year last aforesaid, demised to the said James Jackson, the *tenements aforesaid, with the appurtenances, to have and to hold to the said James Jackson, and his [*10 assigns, from the said first day of May, then last past, until the full end and term of twenty-one years from thence next ensuing, and fully to be complete and ended, in the manner in which the said demise is set forth in the said declaration of the said James Jackson. By virtue of which said demise, the said James Jackson entered into the said lands and tenements, with the appurtenances, and was thereof possessed: and he being so possessed thereof, the said George Clarke, the said defendant, afterwards, to wit, on the tenth day of May, in the year last aforesaid, with force and arms, &c., entered into the said tenements, with the appurtenances, which had been demised to the said James Jackson as aforesaid, and ejected, expelled and amoved the said James Jackson from his said possession, as the said James Jackson hath above complained against the last aforesaid George Clarke.

And the jurors aforesaid, upon their oath aforesaid, further say, that at the time of commencement of this action, the tenements aforesaid, in the said declaration specified, were, and ever since have been, and yet are, of a value exceeding the sum of $500, exclusive of all costs and expenses. And the jurors aforesaid, on their oath aforesaid, further say, that the said James Jackson, at the time of the commencement of this action, was and yet is a citizen of the state of New York, in the United States of America. And that, at the time of the commencement of this action, the said George Clarke, the said defendant, in the said declaration named, *was [*11 and yet is a subject of the king of the united kingdom of Great Britain and Ireland.

But whether, upon the whole matter aforesaid, by the jurors aforesaid, in manner aforesaid found, the said George Clarke, the said defendant, is guilty of the trespass and ejectment above mentioned, the said jurors are entirely ignorant, and pray the advice of the court thereon. And if it shall appear to this court, that the last aforesaid George Clarke, in construction of law, is guilty of the trespass and ejectment above mentioned, then the said jurors

merchants residing in Portugal. The cargo consisted of many different shipments; most of them were accompanied with bills of lading, directing a delivery to shipper, or order; of these, a few were specially indorsed; generally, however, they were without indorsements, or with blank indorsements only. A few shipments were accompanied with bills of lading, deliverable to persons in Lisbon, specially named in the bills. Very few were accompanied with lettters or invoices; these, it was alleged in the claim, had probably been sent by the regular packet.

*16] In August 1814, the district court pronounced its *sentence, condemning as prize of war, "all that part of the cargo for which no claim had been put in," and "all that part of the cargo which was shipped, as evidenced by bills of lading, either without indorsement, or with blank indorsements, and not accompanied by letter or invoice, viz: —— and that part appearing by the bill of lading to consist of forty bales of goods shipped by Moreira, Vieira & Machado. Further proof was ordered with respect to the residue of the cargo and the vessel.

From this sentence, the claimants appealed to the circuit court. That court, in May 1815, dismissed so much of the appeal as respected the brig, and that part of the cargo in respect to which further proof was ordered, as having been improvidently allowed, before a final sentence, and affirmed the residue of the decree, except in regard to the forty bales shipped by Moreira, Vieira & Machado, with respect to which, further proof was directed, to establish the right of Francis Jose Moreira to restitution of one-third part therof.

In April 1816, further proof was exhibited to the district court, in support of the claim for the parts of the cargo comprehended in the bills of lading numbered 108, 109, 141, 122 and 118, which bills, being deliverable to merchants residing in Lisbon, whose names were expressed therein, were not indorsed. The further proof was deemed sufficient, and restitution was ordered. The vessel, and the residue of the cargo, were condemned as prize of war.

*17] From so much of this sentence as awarded restitution, *the captors appealed; and in May 1816, the circuit court decreed as follows: "This court being of opinion, that the former sentence of the district court, affirmed by the sentence of this court, rendered in May term, in the year 1815, having been left imperfect, by omitting to recite the particular claims intended to be involved in the condemnation pronounced in the district court, in terms of general description; and being also of opinion, that the words 'all that part of the cargo which was shipped, as evidenced by bills of lading, either without indorsement, or with blank indorsements, and not accompanied with letter or invoice,' could be intended for those bills only which were to shipper, or order, and not to those addressed to consignees named in the bill itself—is of opinion, that there is no error in the sentence of the district court, and doth affirm the same."

From this decree, the captors appealed to this court. On the interposition of this appeal, the circuit court ordered that Joseph Winn, a British born subject, resident in Portugal, in whose behalf a claim was filed to No. 118, should be permitted to offer further proof to the supreme court, to be admitted or rejected by that court.

The Friendschaft.

Wheaton, for the appellants and captors.—1. The decrees of the district court of August 1814, and of the circuit court of May 1815, were final and conclusive, and ought to have precluded the district court from subsequently allowing further proof as to these five claims. The terms of general description *which are used by the judge of the district court, are equivalent to a particular designation of the claims intended to be [*18 condemned. "All that part of the cargo which was shipped, as evidence by bills of lading, either without indorsement, or with blank indorsements, and not accompanied with letter or invoice"—is as effectually condemned by the sentence, as if the particular portions of the cargo, thus documented, had been specifically enumerated. The portions now claimed were shipped, as evidenced by bills of lading, either without indorsement, or with blank indorsements, and not accompanied with letter or invoice. Consequently, they were included in the condemnation by the district court, which became final and conclusive upon the parties, by the decree of the circuit court, rendered at May term 1815, affirming that of the district court, and from which no appeal was entered. The subsequent proceedings, by which the district court admitted the claimants to further proof, were, therefore, *coram non judice*, and utterly null and void. These branches of the cause were completely extinct, and could not be revived in any court.

2. And can this court have the least doubt of the justice and legality of this decree of the district court, as thus understood and explained? Is it possible, that it is come to this, that in a court of prize, a mere bill of lading to A. B., or assigns, unsupported by any other documentary evidence found on board, or by the oath of the master, shall he regarded as sufficient, even to entitle the party to further proof? If goods, shipped in the enemy's country, can pass *the seas under so thin a veil as this, the defects of [*19 which may afterwards be supplied by fabricated proofs, what security is there for belligerent rights? To what cause are we to attribute a transaction so unusual and irregular in commerce, but to the desire of the British shippers and owners, to retain in their own hands the double power of stopping the goods *in transitu*, and of enabling the consignees to claim them in the prize court, in case of capture? If this practice be tolerated by the court, the enemy shipper need resort to no complicated machinery of fraud, in order to cover his property. He need do no more than put on board a bill of lading, unaccompanied by any invoice of the goods, or letter of advice showing in whom the property vests. In case of capture, nothing more will be necessary, than to enter a claim in the name of the neutral consignee, and to demand an order for further proof, and under that order, to ransack the great *officina fraudis*, to find the instruments of forgery and perjury; the aid of which will not become necessary, in case the shipment, thus made, escapes the vigilance and activity of the belligerent cruisers. Should they thus escape, the goods will be sold on account of the enemy's shipper, and the proceeds of the sale will be remitted to him again, by the same process; and thus the whole of the enemy's trade may be effectually screened from the perils of war. A bill of lading is an instrument too easily fabricated, to permit a court of prize to consider it alone as furnishing any proof (even presumptive) of property in the consignee. Whether the goods had been previously ordered by the Portuguese *consignee, or sent by the British shipper, for sale on his own account, [*20

they would equally have been accompanied by the same document, which is equivalent to no evidence whatever of proprietary interest, found on board. Unless some such evidence be found on board, or a foundation be laid by the preparatory examinations of the captured crew, to let the claimants into further proof, the necessary simplicity of the prize proceedings forbids a resort to extraneous testimony; and as that originally before the court is insufficient to entitle the party to restitution, condemnation must ensue. Not only are the bills of lading unaccompanied by invoices and letters of advice, but they do not express the shipment to be "for account and risk' of the consignees; and the freight is payable in London, and (of course) by the consignors. These circumstances distinguish this case from all those cases in which it has been determined (under the municipal law), that a bill of lading, expressing the shipment to be for account and risk of the consignee, or his assigns, vests the property in him, subject only to the right of stoppage *in transitu;* and the same circumstances liken it to those where the obligation on the part of the consignor to pay the freight, was held to authorize him to bring an action against the carrier master, for the goods, notwithstanding the form of the bill of lading. *Davis* v. *James*, 5 Burr. 2680; *Moore* v. *Wilson*, 1 T. R. 659. It is wholly incredible, that the letters and invoices which ought to have accompanied these shipments, were
*21] sent by the Lisbon packet (as suggested), since, *though duplicates of such papers may be sent, and frequently are sent, by conveyances, other than that of the ship in which the goods are transported, yet it is unusual, and mercantilely irregular, not to send the originals with the goods. The invoices are, by the revenue laws of most, if not all, countries, indispensably necessary, to enter the goods at the custom-house, avoiding the inconvenience of unpacking and valuing them. These papers are required, by the law of nations, and the prize code of every country, to accompany the bill of lading, in order to fortify and confirm it. The absence of them does not, indeed, in all cases, furnish a substantive ground of condemnation, and exclude the party from further proof; but in order to avoid this consequence, there must be some favorable presumption raised by the circumstances of the case, and the nature of the documentary evidence found on board. This presumption cannot exist, in the case of a shipment in the enemy's country, of goods, the growth or manufacture of that country, under a bill of lading, unsupported by the oath of the master, and unaccompanied by any invoice, letter of advice, or other document whatever. The privilege of further proof is imparted under the sound discretion of the court, where a foundation is laid for it, by the papers found on board, and the depositions of the captured persons. Neither the documentary evidence, nor the examinations *in præparatorio*, afford any foundation for it, in the present case; since they do not furnish any, the slightest, reason for believ-
*22] ing, that it belongs as claimed. The court would be *opening a wide door for fraud, were it to extend the privilege of further proof to such a case, which is neither one of honest ignorance nor mistake. It is impossible, that the parties should have been ignorant of what both the usage of trade, and the practice of prize courts, require. It is impossible, that they should have omitted, by mistake, what could not have been omitted but by design. The ancient French prize law, and the prize regulations of many other countries, do absolutely exclude further proof, and condemn, or

restore, upon the original evidence only. If, by the more mitigated practice, which this court has adopted, further proof be sometimes allowed, it is not as of strict right, but of equitable indulgence, where the circumstances of the case lay a foundation for it, and the claimants do not forfeit the privilege by their own misconduct.

3. No additional further proof ought to be admitted in this court, under the special orders of the circuit court, in the claim of Mr. Winn, giving him liberty to produce still further proof (in addition to the further proof exhibited to the district court), in this court, to be admitted, or rejected, at the discretion of the court. It is a settled principle of practice, that further proof cannot be introduced in this court, unless, under the circumstances of the case, it ought to have been ordered in the court below. Such is the limitation to the admission of further proof in the appellate tribunal, which has been established by the Lords of Appeal, in England, and adopted by this court. If, as has been contended, further proof ought not to *have [*23
been admitted in the district court, the consequence follows, that it ought not to be admitted here. But the lapse of time alone ought to preclude the claimants from this indulgence. They were fully apprised of the nature of the proof which their case required; they had it in their power to produce it; and after two years have elapsed, the necessity of suppressing the frauds which might be consequent upon such excess of indulgence, demands that the court should reject the additional further proof now offered by them. *The Dos Hermanos*, 2 Wheat. 96, 98.

4. Mr. Winn's claim ought to be rejected, because, supposing his proprietary interest to be made out ever so clearly, he is a British born subject, who offers a claim, upon the ground of his being a resident merchant of Portugal, although, at the time of the first adjudication, he was not domiciled in that country. The claimant makes an affidavit, at London, in June 1815, in which he describes himself, as "of the city of Lisbon, in Portugal, now in London on mercantile business," swears to the property in himself, and that at the time of the shipment and capture, he was a domiciled subject of Portugal, and had resided in Lisbon for several years preceding the capture, and until the 12th of June 1814," when he left Lisbon for Bordeaux, and "has since arrived" (without saying when) "in this city on mercantile business;" that he still is a domiciled subject of Portugal, &c. "The native character easily reverts," says Sir W. Scott (*La Virginie*, 5 Rob. 93); and it is so, not merely because *he says it, but from the [*24
very nature of things, and the gravitating tendency (if the expression may be allowed) which every person has towards his native country. Here, Mr. Winn was returning to his native country, shortly after the capture, and we may safely conclude, arrived there, long before the first adjudication. There he continued, until long after the peace, without resuming his acquired domicil in Portugal; and more than a year afterwards, we find him still resident in his native country. He was not *in transitu* to regain his neutral character, like Mr. Pinto in the case of *The Nereide*, 9 Cranch 388; but he was *in transitu* to regain his native hostile character. He did regain it, and became a redintegrated British subject. That the party must be in a capacity to claim, at the time of adjudication, as well as entitled to restitution, at the time of sailing and capture, is an elementary principle, which lies at the very foundation of the law of

prize. It is alluded to by Sir W. SCOTT, in a leading case on this subject (*The Hertselder*, 1 Rob. 97); it is evinced by the anciently established *formular* of the test-affidavit, and sentence of condemnation, both of which point to the national character of the party, at the time of adjudication, as an essential ingredient in determining the fate of his claim. Mr. Winn had no *persona standi in judicio*, at the time of the first adjudication; and unless he has been rehabilitated by the subsequent intervention of peace, and restored to his capacity to claim, by a species of the *jus posliminii*, his native character still remains fixed upon him, and his property must be con-
*25] demned, by relation back to the time of the first *adjudication, to which period everything must be referred.

5. But even the Portuguese domicil of Mr. Winn will not avail, to avert the condemnation of his property, because his native character is preserved, notwithstanding his residence and trade in Portugal. As the native domicil easily reverts, so also, it may, with truth, be affirmed, that it is with difficulty shaken off. Every native subject of a belligerent power is, *primâ facie*, an enemy of the other belligerent. To repel this presumption, he must show, not merely that he has acquired a personal domicil in a neutral country, but that, under all the circumstances of the case, he is unaffected with the hostile character of his native domicil. The political relations between Great Britain and Portugal completely recognise the privileged national character of British subjects in Portugal, which is preserved to them, in a manner analogous to that of European merchants in the East, who are held to take their national character from the factory to which they are attached, and from the European government under whose protection they carry on their trade. *The Indian Chief*, 3 Rob. 25. Thus, also, Sir W. SCOTT states, in *The Henrick and Maria*, 2 Rob. 50, that British subjects, resident in Portugal, retain their native national character, in spite of their Portuguese domicil, even in the estimation of the enemy himself (France), and that they exercise an active jurisdiction over their own countrymen settled there. This peculiar immiscible character of British subjects in Portu-
*26] gal, is strengthened *by the circumstance of that country having been, from the earliest periods of her national existence, the ally of Great Britain; and something more than a mere common ally, as Sir W. SCOTT observes, in *The Flad Oyen*, 1 Rob. 135. The case of *The Danaos*, cited in a note to *The Nayade*, 4 Rob. 210, in which the Lords of Appeal allowed a British born subject, resident in the English factory at Lisbon, the benefit of a Portuguese character, so far as to legalize his trade with Holland, then at war with England, but not with Portugal, must be considered as a departure from principle, and imputed to some motive of national or commercial policy, operating on the Lords at the time. Certain it is, that the reasons on which Sir W. SCOTT grounds the opinion expressed by him, are entitled to much more weight than is the mere authority of the Lords, unsupported by any reasons whatever. This court, which is the supreme appellate prize tribunal of this country, will scrutinize carefully all the precedents settled in the British prize courts (since the United States ceased to be a portion of the British empire), and will regard rather the reason than the authority on which they are founded. Trace the treaties between Great Britain and Portugal, and it will be found, that they impress something like a provincial dependence on Portugal, and an independent character on British subjects

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resident in that country. It is to the lights of history that we must resort, to account for compacts so singularly unequal. Before the subjugation of Portugal by Spain, the ancient *Portuguese kings granted special immunities to English merchants settled in their dominions. The [*27 want of capital, in a poor and comparatively barbarous country, made it necessary to encourage the establishment of foreign merchants in factories, which were essential to their protection, on account of the difference of language, manners, religion and laws, almost (if not quite) as great as between Christendom and the countries of the East.(*a*) On the restoration of the monarchy by the house of Braganza, in 1640, John IV. was supported by Charles I. of England, who was the first prince that acknowledged the new Portuguese monarch, and entered into a treaty with him. Under the English commonwealth, this treaty was renewed by Oliver Cromwell, whose energy in maintaining the foreign influence and commercial interests of his country is so well known. Charles II. married the Infanta of Portugal; confirmed all former treaties; and made a new and perpetual one with Alfonzo VI. Under his mediation and guarantee, Spain acknowledged the independence of Portugal; which Great Britain has since constantly maintained, by succoring Portugal against her enemies. In return for a friendship so ancient, so unalterable, and so beneficial, Portugal has lavished upon the subjects of Great Britain the most precious commercial privileges: and for them has even relaxed her commercial monoply, and opened to them the *sanctum sanctorum* of her possessions in the two Indies.

These privileges have been uniformly *revived and renewed in every successive treaty which has been formed between the two [*28 countries, and may be enumerated under the following heads. 1st. Prizes made by British subjects, from nations at peace with Portugal, may be carried into the Portuguese ports for adjudication, and condemned whilst lying there. *The Henrick and Maria*, 4 Rob. 50. If the ports of Portugal can be so far considered as British, as that British prizes may be carried into them, and condemned, surely they must be considered such in respect to British subjects residing and trading there. The rule of reciprocity or amicable retaliation may be extended to them (being enemies) though it may not be extended by the court to the subjects of Portugal (because they are friends) and the judicial department cannot reciprocate to, or retaliate on them, the unjust proceedings of their nation. 2d. Portugal is bound, by treaty, to deliver up British vessels captured and brought into her ports by the enemies of Great Britain, but her friends. 2 Chalmers' Coll. Treat. 279. 3d. British subjects, resident in Portugal, are exempt from the ordinary jurisdiction of the country; and are amenable only to the judge conservator appointed by themselves, who has cognisance of all civil causes in which they are concerned; and the ordinary authorities of the country cannot proceed against them in criminal cases, without a permission in writing from the judge conservator, except only where the offender is taken *flagrante delicto*. 2 Chalmers 271, Treaty of 1674, art. 7, 13, Treaty of 1810, art. 10. 4th. *The Portuguese courts of probate, or orphans' courts, have no [*29 authority whatever, in the distribution of the effects of British sub-

(*a*) 2 Posthelwaite's Dict. of Trade and Commerce, art. Treaties.

jects, deceased, in Portugal, but the same is referred to the judge conservator, under whose superintendence, administrators, are appointed by a majority of the British merchants resident in the place. 2 Chalmers 271, 281. 5th. British subjects, in Portugal, have the privilege of being paid their debts due to them by Portuguese subjects, whose property may be seized by the inquisition, or the king's exchequer. 2 Chalmers 260. 6th. They are exempted from the operation of the fundamental law of the Portuguese monarchy, which has immemorially excluded every other religion from Portugal, except the Roman Catholic; and they are permitted to enjoy their own religious principles and worship as Protestants. 2 Chalmers 265. 7th. This favored nation are also exempted from all the monoplies, and other exclusive privileges, with which the internal and external commerce of Portugal and her colonies are cramped and restrained, and to which Portuguese subjects are exposed. The only exception to this immunity is the crown farm, for the exclusive sale of certain precious productions. Treaty of 1810, art. 3. The treaty of 1810, now subsisting, confirms and renews all the privileges and immunities granted by former treaties, or municipal regulations, except only the stipulation that free ships should make free goods. These
*30] privileges and immunities segregate British residents in *Portugal from the general society, and from the commercial, political and ecclesiastical regulations of the country. They distinguish those residents from the other inhabitants, as much as the merchants of Christendom are distinguished from the natives in the oriental countries. The privileged character of Christians, established in those countries, depends as much upon the conventional law, as does that of British subjects settled in Portugal. The treaties and capitulations between the powers of Christendom and the Porte, secure to the subjects of the former, privileges not more extensive than those which are now enjoyed, and have been enjoyed from time immemorial, by the British in Portugal. Valin, *Sur l' Ordon.* 234–35; 2 Chalmers 436. It is true, that by the treaty of 1810, art. 26, his Britannic majesty renounces the right of establishing factories or corporations of merchants in the Portuguese dominions, but there is a proviso, that this concession "shall not deprive the subjects of his Britannic majesty, residing within the dominions of Portugal, of the full enjoyment, as individuals engaged in commerce, of any of those rights and privileges which they did or might possess, as members of incorporated commercial bodies; and also, that the trade and commerce carried on by British subjects shall not be restricted, annoyed, or otherwise affected, by any favors within the dominions of Portugal;" and in the case of *Mr. Fremeaux*, the Lords of Appeal, in England, decided, that the claimant was to be considered as a Dutchman,
*31] because he carried on trade at Smyrna, under *the protection of the Dutch consul, although it was proved in that gentleman's case, that there was no Dutch factory at Smyrna, and that the Dutch merchants there are not incorporated. Cited in *The Indian Chief*, 3 Rob. 32; Ibid. app'x, Note I. 295.

Gaston, for the respondents and claimants.—1. On the first point, the claimants have to encounter a difficulty purely technical, which cannot pretend to a foundation in justice, and which, indeed, aims to prevent a decision upon the merits of the controversy. If this difficulty can neither be sur-

mounted nor escaped, without a violation of the established principles and rules of jurisprudence, the claimants must submit, without repining. But it will be impossible for the friends to the repose of nations, and to the impartial administration of justice in the courts of belligerents, not to regret, that the highest tribunal in our land should find itself so fettered with forms, as to be unable to do what shall appear to them to be right; as to be compelled to condemn as prize of war, what the inferior tribunals shall have restored (in their opinion, justly) as neutral property. The captors' objection is founded on a literal exposition of the decree of August 1814, inconsistent with its obvious meaning. However desirable it may be, that precision should be used in drawing up the decrees of judicial tribunals, yet the infirmity of human nature, and the imperfection of human language, alike demand that these decisions should not be perverted, by verbal criticism, from their substantial import. No one can doubt the *meaning of the sentence of August 1814; no one can hesitate to say, that it [*32 designed not to condemn such parts of the cargo as were evidenced by bills of lading, addressed to consignees, specially named in them. This design appears as distinctly as though it had been expressed in the most formal terms. The court exempts from condemnation, and reserves for further proof, all the cases of bills of lading, deliverable to shipper or order, which are specially indorsed to consignees; *à fortiori*, it could not but exempt from condemnation, those where the bills of lading are addressed to consignees specially named in the bills of lading. It is the order of the English shipper for the delivery of the goods to the Portuguese consignee, that raises the doubt where resides the proprietary interest; whether in the shipper or in the consignee. And, unquestionably, the probability that such interest in the consignee is, at least, as strong, where the consignment is original, and on the face of the bill of lading, as where it is made by an indorsement of the bill. The sentence of August 1814, which is insisted on as condemning the property in question, could not have that effect, until it was completed. A blank was purposely left for the insertion of the parts of the cargo intended to be condemned. Until this blank was filled up, or something done by the court, equally definitive and precise, the sentence was necessarily imperfect, both in substance and in form. This imperfection continued as to the district court, until August term 1816, and then the property in question was not only not condemned, but ordered to be restored. The affirmance of the sentence of August 1814, by *the [*33 circuit court, was in general terms. It cannot, therefore, have any other effect than if the sentence affirmed had been repeated *in totidem verbis*. The sentence of condemnation, therefore, of the circuit court, of May 1815, was incomplete; and remained so until November term 1816, when, in direct terms, it was declared, that it should not apply to the present claims. Whatever informalities or errors of proceeding may have been had below, yet, as the property to which the claims apply is still in the custody of the law, and the whole case in relation to it is now before this court, all these errors and irregularities will be so corrected, as to make the final decision of the controversy, and disposition of the property, conform to the rights of the parties litigant. Whether the district court, in August 1814, did or did not condemn this part of the cargo; whether it did or did not decree that further proof should be heard in relation to it; yet, if it ought

not to have been condemned—if further proof ought to have been received in relation to it—this court will receive such further proof.

2. But it is contended, that whatever might have been the meaning of the sentence of the district court of August 1814, affirmed in the circuit court in May 1815, it ought to have condemned the goods in question, and not to have let in the claimants to further proof. And this position is founded on the assertion that the bills of lading, No. 108, 109, 141, 122 and 118, furnish no evidence whatever of proprietary interest in the consignees, and on the apprehension that the admission of further proof, in cases so
*34] circumstanced, might destroy all security for belligerent *rights. And does a bill of lading furnish no evidence, not even presumptive, of proprietary interest in the consignee? It is understood, and such was the language of this court, in the case of *The St. Joze Indiano*, 1 Wheat. 212, that in general, the rules of the prize court, as to the vesting of property, are the same with those of the common law. Now, "every authority which can be adduced, from the earliest period of time down to the present hour, agree, that at law, the property does pass as absolutely and as effectually (by a bill of lading), as if the goods had been actually delivered into the hands of the consignee." *Per* BULLER, J., in Dom. Proc., *Lickbarrow* v. *Mason*, 6 East 23 n. "If, upon a bill of lading" (says Lord HARDWICKE, in *Snee* v. *Prescott*, 1 Atk. 245), "between merchants residing in different countries, the goods be shipped and consigned to the principal, expressly, in the body of the bill of lading, that vests the property in the consignee." The right of the consignor to stop goods *in transitu* is not founded on any presumed property in the consignor, but necessarily supposes the property to be in the consignee; for, "it is a contradiction in terms, to say a man has a right to stop his own goods *in transitu*." It is a right founded wholly on equitable principles, "which owes its origin to courts of equity—and the question is not whether the property has vested under the bill of lading, for that is clear; but whether, on the insolvency of the consignee, who has not paid for the goods, the consignor can countermand the consignment,
*35] *or, in other words, divest the property which was vested in the consignee." 6 East 28 n. Unless, therefore, a totally different rule, as to the vesting of property, is to be asserted in a court of prize from that which is established at law, a bill of lading absolutely vests the property in the consignee, and of course, is the appropriate and definite evidence of his proprietary interest. But it is said, these bills of lading do not express the shipment to be for the account and risk of the consignees, and state that the freight has been paid in London, and, "of course, by the consignors." Surely, it is not seriously contended, that the omission to declare the shipment to be on account of the consignees, and the declaration that the freight has been paid in London, and "of course, by the consignors," could have been designed to secure to the consignors the right of stopping *in transitu*? This right is founded on principles of equity, which give it a direct application to shipments made on account of the consignees, and which have no connection whatever with the legal consequences of the payment of freight.

Let us see, however, what inferences may be fairly drawn from the peculiarities which are noticed in the bills of lading: they omit to state that the shipment is on account and risk of the consignees. Shall we thence infer, that the shipment is on account and risk of the consignors? This is not the

inference of the law. If the bill of lading vests the property in the consignee, he, of course, sustains the peril of the shipment, unless there be an agreement to the contrary. It would be a singular *absurdity, indeed, if the law, upon the instrument, presumed, that the consignee [*36 was the owner, and, at the same time, inferred, that he did not bear the ordinary risks of ownership. Where the shipment is on account and at the risk of the consignor, and not of the consignee, there it may be proper to express the fact, because it is opposed to the legal presumption; but that an omission to state, what, without statement, is presumed, can be converted into an argument against the presumption, will be an instance of intellectual dexterity, rather fitted to surprise, than to satisfy the inquirer after truth. A bill of lading evidences an agreement made by the master with the shipper for the delivery of the goods to the consignee. His undertaking is simply to carry the goods for the stipulated price to the consignee; he knows not that the consignee is to sustain the risk of the shipment; he cannot, therefore, with propriety, aver it in his contract. If, indeed, the consignor is to sustain the risk, and wishes this fact to be stated in the master's undertaking, then has he the full evidence which warrants the insertion of such a clause in the bill of lading. And accordingly, such is the mercantile usage; bills of lading ordinarily express account and risk, when they are not the account and risk of the consignee. But it is otherwise with invoices; these are documents passing between the parties to the shipment, and contain the declaration of the consignor to the consignee. These, therefore, declare, however it may be, at whose account and hazard the shipment is made. The other peculiarity noticed in the bills of lading is, that the *freight is paid in London, and "of course, by the consignors." If [*37 this corollary, thus summarily deduced, of a payment by the shippers, mean no more than a payment by the consignees, through the shippers, as their immediate agents at London, it may be admitted, as probable, and, at all events, as harmless. But if it mean a payment by the shippers, as principals, or on their own account, then it is denied to follow from the proposition which it claims as its premises. But the peculiarities, thus examined, are relied on as constituting a support on which to rest the doctrine contained in the cases of *Davis* v. *James*, 5 Burr. 2680, and *Moore* v. *Wilson*, 1 T. R. 659, which are cited (as it would seem), to prove, that where the consignor pays the freight, the bill of lading does not vest the property in the consignee! It is not material to inquire, how far these cases would now stand the test of a strict scrutiny. It is but doing justice, however, to the great men who decided them, to say, that they establish no such doctrine. Lord MANSFIELD expressly declares, that he does not proceed at all on the ground of proprietorship, but simply on the agreement of the carrier. And Lord KENYON, in *Dawes* v. *Peck*, 7 T. R. 330, states, that the doctrine which they furnish is no more than that the consignor may bring an action for breach of contract against the carrier, on his agreement, where the consignor is to be at the expense of the carriage, "where he stands in the character of an insurer to the consignee for the safe arrival of the goods."

It is alleged, that if the interest in these claims *were *bonâ fide* [*38 neutral, it is incredible, that the invoices and letters would not have accompanied the shipment. Is it not equally probable, where the shipment is not on neutral account, or partly on neutral and partly on hostile account,

and there is no attempt at deception, that it would have been accompanied with letters and invoices? Yet, in the vast multitude of the shipments, clearly on enemy account, made by this ship, and which have been condemned without a controversy, there is not one in ten thus accompanied. The packet sails between London and Lisbon, with a regularity, certainty and frequency, little short of what takes place in transmissions by mail. It is the great and established medium of conveyance, established by treaty stipulations, for passengers and letters. Is it strange, therefore, that all the communications between the shipper and the owner of the goods, except a copy of the bill of lading (which at once evidences the property, and is directory to the master), should have been sent by this certain and regular and official medium of conveyance? If duplicates of these communications had accompanied the shipments in question, this unusual caution might have been construed into a proof of guilt, and these additional evidences of neutral proprietorship stigmatized as the badges of fraud. But it is alleged also, that the bills of lading are not verified. The only individual of the crew, examined by the commissioners, is the master, and he supports the bill of lading so far as can be expected of a carrier-master. In answer to the 13th interrogatory, he declares, that the bills of lading are not false or colorable; and in answer to the 20th, *that he presumes the goods shipped belong to the respective consignees. The rights of belligerents are not the only rights deserving of the notice, and entitled to the protection of courts of prize. Though human testimony may sometimes be corrupt, and often fallacious, it is by human testimony alone, that human tribunals can hope to eviscerate the truth. Condemnation should take place only when the fact of enemy's property has been ascertained; and where that fact is doubted, proof should be resorted to. These principles have received the countenance of all those engaged in the administration of public law, whom the civilized world (cruisers excepted) regard with reverence. They will be found stated with simplicity and perspicuity, in the famous British answer to the Prussian memorial, and communicated to the American government in 1794, as the basis of the proceedings in British courts of admiralty; and which has been adopted by this court as the *substratum* of its own conduct in cases of prize.

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3. When it is recollected that the claimants have sought to furnish proof, both from the port of shipment and the port of destination, from London and from Lisbon; that during the war, the means of procuring such proof from Europe and bringing it to the United States, were unfrequent and uncertain; and that delay will not be occasioned by listening to the additional proof now tendered, it is believed, that the court will not refuse to hear it. The case of *The Bernon*, 1 Rob. 86, shows that the court, after receiving further proof, may order additional proof, if requisite to enlighten its judgment; *and the case of *The Frances*, 8 Cranch 308, 353, is an authority in point, that the appellate court may order additional proof, if the further proof on which the cause has been heard below is defective. May not the appellate court then hear it, if to prevent injurious delays, it be prepared in anticipation?

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4. The only inquiries of fact, as to the character of the claimant, according to the rules laid down by Sir WILLIAM SCOTT, in *The Herstelder*, 1 Rob. 97, are, was he, at the time of seizure, entitled to restitution; and is he, at

the time of adjudication, in a capacity to claim. The present capacity of the claimant, is without doubt; his right to restitution must be tested, by his national character at the time of seizure, on the 10th of May 1814. But the objection is founded entirely on a misconception of the meaning of the affidavits. Whether the facts testified be true or not, must depend on the veracity of the deponents. If they are to be believed, they prove a residence of the claimant, as an established merchant, at Lisbon, for several years preceding the seizure, and up to the 12th of June thereafter; the leaving of Lisbon, on mercantile business, *animo revertendi*, on the 12th of June 1814, and the continuance of his domicil, residence and establishment there, and a continued purpose of actually returning thither, up to the date of the affidavits.

5. It must be conceded, that for commercial purposes, among the civilized nations of Europe and the West, the national character of an individual is, ordinarily, that of the country in which he resides. No position is better established than this, that if a person goes to another country, and there engages in *trade, and takes up his residence, he is, by the law of nations, to be considered as a merchant of that country. This general rule applies to the case of British merchants domiciled in Portugal. [*41 They owe allegiance to the government, are protected by its laws, mingle intimately with the natives in all the social and domestic relations, cherish Portuguese industry, increase Portuguese capital, and contribute to the revenue of Portugal. It is true, that a very intimate commercial connection has long subsisted between Portugal and Britain, and that the subjects of the latter are encouraged to settle in the Portuguese dominions, by many advantageous regulations in favor of their traffic. But it is by no means true, that any British authority is exercised in Portugal, or that Portugal can be viewed as the dependent province of Britain. 1st. There is no authority for the assertion, that the ports of Portugal are open in war for adjudication of British captures, made from nations at peace with Portugal. An irregular practice formerly obtained to that effect, to which Sir WILLIAM SCOTT alludes, in *The Henrick and Maria;* but it was sanctioned neither by treaty nor decree. The treaty of 1810 is utterly silent on that head, and it is a matter of notoriety, that on the breaking out of the late war between the United States and Great Britain, a royal decree was issued, forbidding the cruisers of belligerents from bringing their prizes into the dominions of Portugal, which was enforced throughout the war. 2d. Portugal is not bound by treaty to deliver up British vessels, brought into her ports, which have been taken by the enemy of Britain. *The 30th article of the present treaty limits the obligation to the restitution of property [*42 plundered by pirates; and this obligation is reciprocal. 3d. British residents are not exempt from the jurisdiction of the Portuguese tribunals. They have the privilege, indeed, of choosing from among the commissioned judges of the realm, one who is to be presented to the king, for his approbation, as their judge conservator, and who, if approved, is so appointed. The authority of this judge (who is usually selected because of his knowledge of the English language) reaches only to the trial, in the first instance, of commercial disputes brought before him by British merchants, and is ever subordinate to the higher tribunals of justice, established in the realm, who, in all cases, possess over him an appellate jurisdiction. The privilege is not pecu-

liar to the British, but is extended to every friendly European nation. 4th. The provision of the treaty of 1654, relative to the appointment of administrators to British residents, dying intestate, is not renewed in the treaty of 1810. There is, in lieu of it, a reciprocal stipulation (Art. 7th), for the disposal, by the subjects of both nations, of their personal property by testament. 5th. The provision for applying the effects seized by the Inquisition to the payment of the debts due the British creditor, is but a dictate of justice, and probably places these creditors on the same footing with native creditors. It is not found in the treaty of 1810. 6th. There is nothing extraordinary in the mutual stipulation for the tolerance, by each, of the religion of the subjects of the other, so far as it may consist with the laws of
*43] their respective realms. 7th. Nor is it unusual, *to grant to the subjects of other nations, an exemption from monopolies obligatory on native merchants. It is perfectly familiar to the court, that under the British treaty of 1795, such an exemption was accorded to American merchants from the monopoly of the British East India company. And in the treaty of 1810, it will be seen, that the stipulations are reciprocal. There is much difficulty in ascertaining the precise nature of the immunities enjoyed by British merchants in Portugal, at the date of the treaty of 1810, because the practice had been to grant them occasionally by *alvaras*. These are temporary proclamations, which have effect only for a year and a day. It is very certain, that some privileges, heretofore granted, were not then possessed. For instance, the *alvara* of 1717 exempts Englishmen from certain taxes to which the natives are liable, while the 7th article of the treaty of 1810, provides that they shall be liable to the same taxes (and no other) as are imposed on the natives of Portugal. The probability is, that the most important of these immunities are especially enumerated in the treaty. It is unnecessary, however, to proceed further with this examination. Enough appears, to show that the attempt to take the case of British merchants, resident in Portugal, out of the general rule applied to domicil among civilized nations, whatever admiration may be due to its boldness, cannot receive the sanction of an enlightened court. The analogy between such merchants and Europeans in Turkey, who, there, neither sustain their original character, nor take the character of the people within whose territories they sojourn,
*44] but owe their name and political *existence to the factory and association under whose protection they carry on a precarious traffic—who are viewed as a people exempt from Turkish dominion,(a) and who never mix with the natives in any social or domestic concern—is too forced and unnatural, to afford a basis for any arguments applicable to them both. No authority is cited in support of this objection, other than a remark of Sir WILLIAM SCOTT, in *The Henrick and Maria*, which must be understood *secundum subjectam materiam*. He is there speaking of the validity of a condemnation, in England, of an enemy's ship, carried into Lisbon or Leghorn—into the port of a very close and intimate ally. But in opposition to it, there are great authorities. The case of the Armenian merchants resident at Madras, under special privileges, who were, nevertheless, subjected to the general rule of domicil, bears directly upon it (*The Angelique*, 3 Rob. 294, app'x B); the case of *The Nayade*, which applies the com-

(a) See Consular Certificate in The Herman, 8 Rob. app'x I. 295.

mercial rule of domicil to Prussian merchants in Portugal, also bears upon it (4 Rob. 206); the case of *The Danous* (Ibid. 210), decided in March 1802, at a time when the objection was stronger than at present, is directly in point, and of the highest prize tribunal in England. In *The San Jose Indiano* (2 Gallis 268, 292), it was expressly decided by one of the learned judges of this court, that British residents, in the dominions of Portugal, take the character of their domicil, and as to all third parties, are to be deemed Portuguese subjects. This decision was acquiesced in by the counsel for the captors. In the case of *The Antonia Johanna*, such *was considered the settled rule; and accordingly, restitution was made by [*45 this court to Mr. Ivers, a resident British merchant, at St. Michael's, one of the firm of Burnet & Ivers, of the moiety claimed in his behalf as a Portuguese subject. (1 Wheat. 159). The counsel who now advances this objection, declined then to bring it forward.

February 6th, 1818. MARSHALL, Ch. J., delivered the opinion of the court, and after stating the facts, proceeded as follows:—The appellants contend: 1st. That the sentence pronounced by the district court, in August 1814, which was affirmed by the circuit court, in May 1815, condemned finally the packages for which a decree of restitution was afterwards made, and that the subsequent proceedings were irregular, and in a case not before the court. 2d. That upon the merits, further proof ought not to have been ordered, and a condemnation ought to have taken place.

On the first point, it is contended, that these goods, having been comprehended in invoices not indorsed, nor accompanied with letters of advice, are within the very terms of the sentence of condemnation, and must, consequently, be considered as condemned. The principle on which this argument was overruled in the court below, is to be found in its sentence. The district court, in its decree of 1814, did not intend to confine its description of the property condemned, to the general terms used in that decree, but did intend to enumerate the particular bills to *which those terms should [*46 apply. This is conclusively proved by reference to the subsequent intended enumeration, which is followed by a blank, obviously left for that enumeration. Had the enumeration been inserted, as was intended, the particular specification would undoubtedly have controlled the general description which refers to it. The unintentional and accidental omission to fill this blank, leaves the decree imperfect, in a very essential point; and if the case, and the whole context of the decree, can satisfactorily supply this defect, it ought to be supplied. This court is of opinion, that no doubt can be entertained respecting the bills with which the district court intended to fill up the blank. The condemnation of shipments, evidenced by bills of lading, with blank indorsements, or without indorsement, could apply to those only which required indorsement, or which were in a situation to admit of it. These were the bills which were made, deliverable to shipper, or to the order of the shipper. Bills addressed to a merchant, residing in Lisbon, could not be indorsed by such merchant, until the vessel carrying them should arrive at Lisbon. Consequently, such bills could not be in the view of the judge, when condemning goods, because the bills of lading were not indorsed; and had he completed his decree, such bills could not have been inserted in it. No conceivable reason exists, for admitting to further proof,

the case of a shipment, evidenced by a bill of lading, made deliverable to shipper, or order, and indorsed to a merchant, residing in Lisbon; and at the same time, condemning, without admitting to further proof, the same
*47] *shipment, if evidenced by a bill of lading, made deliverable, in the first instance, to the Lisbon merchant. No. 108, for example, is made deliverable at Lisbon, to Signor Jose Ramos de Fonseco, and is consequently not indorsed. It is contended, that these goods are condemned; but had the bill been made deliverable to shipper, or order, and indorsed to Signor Jose Ramos de Fonseco, further proof would have been admitted. Nothing but absolute necessity could sustain a construction, so obviously absurd. This court is unanimously of opinion, that justice ought not to be diverted from its plain course, by circumstances so susceptible of explanation, that error is impossible; and that when the decree was returned to the district court of North Carolina, with the blank unfilled, that court did right in considering the specification intended to have been inserted, and for which the blank was left, as a substantive and essential part of the decree, still capable of being supplied, and in acting upon, and explaining the decree, as if that specification had been originally inserted. This impediment being removed, the cause will be considered on its merits.

It is contended, with great earnestness, that further proof ought not to have been ordered, and that the goods which have been restored, ought to have been condemned as prize of war. In support of this proposition, the captors, by their counsel, insist, that the rights of belligerents would be sacrificed, should a mere bill of lading, consigning the goods to a neutral,
*48] *unaccompanied by letter of advice or invoice, let in the neutral claimant to further proof. It is not pretended, that such a bill would, of itself, justify an order for restitution; but it certainly gives the person to whom it is addressed, a right to receive the goods, and lays the foundation for proof, that the property is in him. It cannot be believed, that admitting further proof, in the absence of an invoice or letter of advice, endangers the fair rights of belligerents; these papers are so easily prepared, that no fraudulent case would be without them. It is not to be credited, that a shipper in London, consigning his own goods to a merchant in Lisbon, with the intention of passing them on a belligerent cruiser as neutral, would omit to furnish a letter of advice and invoice, adapted to the occasion. There might be double papers, but it is not to be imagined, that papers so easily framed, would not be prepared, in a case of intended deception.

It is, unquestionably, extraordinary, that the same vessel which carries the goods should not also carry invoices, and letters of advice. But the inference which the counsel for the captors, would draw from this fact, does not seem to be warranted by it. It might induce a suspicion, that papers had been thrown overboard; but in the total absence of evidence, that this fact had occurred, the court would not be justified in coming positively to such a conclusion. Between London and Lisbon, where the voyage is short and the packets regular, the bills of lading and invoices might be sent by the regular conveyances. But were it even admitted, that a belligerent
*49] master, carrying a *cargo, chiefly belligerent, had thrown papers overboard, this fact ought not to preclude a neutral claimant, to whom no fraud is imputable, from exhibiting proof of property. In the case before the court, no attempt was made to disguise any part of the cargo. By far

the greater portion of it was confessedly British, and was condemned, without a claim. The whole transaction, with respect to the cargo, is plain and open; and was, in the opinion of this court, a clear case for further proof.

The further proof in the claims 108, 109, 141 and 122, consists of affidavits to the proprietary interest of the claimants; of copies of letters, in some instances ordering the goods, and in others, advising of their shipment; and of copies of invoices—all properly authenticated. This proof was satisfactory, and the order for restitution made upon it was the necessary consequence of its admission. (*a*)

*In the claim to No. 118, made for Joseph Winn, the further proof was not so conclusive. It consisted of the affidavit of the claimant [*50 to his proprietary interest, and to his character as a domiciled Portuguese subject, residing and carrying on trade in Lisbon. The affidavit was made in London, on the 29th day of June 1815, but states the claimant to have been at his fixed place of residence in Lisbon, at the time of the capture, where he had resided for several years preceding that event, and where he continued until the 12th of June 1814, when he left *Lisbon for Bordeaux, and has since arrived in London on mercantile business. That [*51 he is still a domiciled subject of Portugal, intending to return to Lisbon, where his commercial establishment is maintained, and his business carried on by his clerks, until his return. To a copy of this affidavit is annexed that of Duncan McAndrew, his clerk, made in Lisbon, who verifies all the facts stated in it.

This property was also restored by the sentence of the district court, and

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(*a*) M. Bonnemant, in his commentary upon De Habreu, makes the following remarks: "Parmi les pièces dont un navire doit être pourvu pour la régularité de sa navigation, il en est de deux sortes; les unes servent à prouver la neutralité du navaire, les autres celle de la cargaison. Celles relatives à la cargaison sont les connoissments, les polices de chargement, les factures. Toutes ces pièces font pleine et entière foi, si elles sont en bonne et due forme. Toute ne sont pas d'absolue nécessité; comme elles sont correlatives, elles se suppléent entre elle et peuvent être supplées par d'autres équivalentes. Mais si l'on en découvre d'autres qui les démentent, s'il se recontre des double expéditions on autres documens capable d'ebranler la confiance, la prèsomption de fraude se change dès-lors en certitude, on ne présume pas simplement le navaire ennemi, on le suppose. La preuvre de la neutralité est toujours á la charge du capture. Cette preuve ne peut et ne doit résulter que des paers trouvés á bord;[1] toute autre indirecte ne peut être reque ni pour ni contre, c'est la disposition de l'art. 11. du règlement du 26 Juillet, 1778, et des précédens qui veulent qu'on n'ait égard qu'aux pièces trouvées à bord, et non à celles qui pourroient être produites après la prise. C'est au capteur à prouver ensuite l'irregularité des pièces, à les discuter de la manière qu'il juge convenable pour en demontrer la fraude et la simulation. Quant aux irregularités que pouvent contenir certaine pièces de bord, ce n'est pas á des omissions de forme usitées que les tribunaux doivent s'attacher, c'est par l'ensemble des pièces, et sur tout par la vérité des choses qui en résulte, qu'ils doivent se déterminer; l'expérience n'a que trop démontré que la plus grande régularité dans les papiers mas quoit souvent la fraude et la simulation, *nimia precautio dolus.*" Bonnemant's Translation of De Habreu, tom. 1, p. 28.

[1] The French prize practice not allowing further proof, but acquitting or condemning upon the original evidence, consisting of the papers found on board, and the depositions of the captors and captured. The only exception to this rule is, where the papers have been spoliated by the captors, or lost by shipwreck, and other inevitable accidents. Valin, *Traité des Prises*, ch. 15, n. 7. But the Spanish law admits of further proof, in case of doubts arising upon the original evidence. De Habreu, part 2, ch. 15.

affirmed in the circuit court. On an appeal being prayed, the circuit court made an order, allowing this claimant to take further proof to be offered to this court. The proof offered under this order consists of a special affidavit of one of the shippers, of sworn copies of letters ordering the shipment, and of the invoice of the articles shipped. This claim, not having been attended, when the sentence of restitution was made, with any suspicious circumstances, other than the absence of papers which have since been supplied, and which was probably the result solely of inadvertence, this court is of opinion, that the further proof now offered, ought to be received. It certainly dissipates every doubt respecting the proprietary interest. The only question made upon it, respects the neutral character of the claimant.

It has been urged, that the native character easily reverts, and that by returning to his native country, the claimant has become a redintegrated British subject. *But his commercial establishment in Lisbon still remains; his mercantile affairs are conducted in his absence, by his clerks; he was himself in Lisbon, at the time of the capture; he has come to London, merely on mercantile business, and intends returning to Lisbon. Under these circumstances, his Portuguese domicil still continues.

*52]

But it is contended, that the connection between Britain and Portugal retains the British character, and the counsel for the captors has enumerated the privileges of Englishmen in that country. These privileges are certainly very great; but without giving them a minute and separate examination, it may be said, generally, that they do not confound the British and Portuguese character. They do not identify the two nations with each other, or affect those principles on which, in other cases, a merchant acquires the character of the nation in which he resides and carries on his trade. If a British merchant, residing in Portugal, retains his British character, when Britain is at war, and Portugal at peace, he would also retain that character, when Portugal is at war, and Britain at peace. This no belligerent could tolerate; its effect would be to neutralize the whole commerce of Portugal, and give it perfect security.

Sentence affirmed.[1]

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*53] McIver, Assignee, &c., *v.* Kyger *et al.*

Specific performance.

Bill for the specific performance of an agreement for the exchange of lands. The contract enforced.

February 4th, 1818. This cause was argued by *Taylor*, for the appellant, and by *Swann*, for the respondents.

February 10th. Marshall, Ch. J., delivered the opinion of the court.—On the 25th day of March 1789, George Kyger and Josiah Watson entered into articles for the exchange of a lot in Alexandria, estimated at $2200, for certain lands in Kentucky, the property of Watson. The lot was to be conveyed to Watson, within eighteen months from the date of the contract; in consideration of which, Watson stipulated to convey to Kyger, such lands, surveyed and patented for him, on the waters of Elkhorn, in Kentucky, as

[1] For a further decision, on Moreira's claim, see 4 Wheat. 105.

the said Kyger should select, to the extent of $2200, at one dollar per acre, as soon as Kyger should make his election, and furnish a plot and survey of the lands chosen.

On the 23d day of December 1790, a second agreement was entered into, which, after reciting the terms of the first, states that George Kyger had represented to the said Josiah, that the land on Elkhorn was not so valuable as Kyger had supposed; and had proposed to extend the time for surveying *and choosing the lands in Kentucky, and to be allowed to take lands, to the amount of $2200, on the waters of Elkhorn, or from other [*54 lands patented for the said Josiah, in Kentucky, at the intrinsic value which such land bore, at any time between the 25th day of March 1789, and the 25th day of September 1790. On this representation, it was agreed, that the time for choosing, valuing and conveying the lands in Kentucky, should be extended eighteen months; that Kyger might take lands to the stipulated amount, from other tracts, which were specified, at the intrinsic value between the periods before mentioned, taking not less than 700 acres out of any one tract. To ascertain the value of these lands, Thomas Marshall, the elder, was chosen on the part of Watson, and Samuel Buler, on behalf of Kyger; and it was agreed, that if T. Marshall should die or refuse to act, the agent of Watson, in Kentucky, should nominate some other person in his stead. A similar provision was made for supplying the place of Buler. The selection and valuation being thus made, Josiah Watson was to convey the land selected and valued

In the year 1806, Daniel Kyger and others, devisees of George Kyger, party to the said contracts, filed their bill in chancery, in the circuit court for the county of Alexandria, stating the contracts above mentioned; and stating further, that the lot in Alexandria had been duly conveyed; that Thomas Marshall had refused to act as a valuer; that the agent of Watson had nominated John McWhattan in his place; that in the year 1791, the said McWhattan and Buler proceeded to make a valuation, by which the lands on *Elkhorn were valued at $1200, and by which one tract of 1800 acres on Ravin creek, and one other tract of 1200 acres on Forklick [*55 creek, were taken to complete the amount in value, to which Kyger was entitled under the contract. The bill proceeds to state, that this valuation was made known to Josiah Watson, and the conveyances demanded, but from some unknown cause, were not made, until Joseph Watson became bankrupt. That in the year —— George Kyger departed this life, having first made his will in writing, in which he devised all his real estate in Kentucky to the plaintiffs. In the year 1805, the plaintiffs presented to Josiah Watson an affidavit made by McWhattan and Buler, stating the valuation they had made, and demanded a conveyance. He excused himself, on account of his bankruptcy, but executed a release which recites the agreement and valuation; and that a deed for the lands had been executed by him, which was in the hands of John McIver, the defendant; this release is annexed to the bill. The bill prays that McIver, the defendant, who is the assignee of the bankrupt, may be decreed to convey the lands contained in the valuation of McWhattan and Buler.

The answer admits the contracts, but does not admit that Thomas Marshall declined acting as a valuer, or that McWhattan was appointed in his place. It avers, that the Elkhorn lands were worth the sum at which

they were rated in the first contract, and that the second was obtained by the fraudulent representations of Kyger. That the valuation of McWhattan and Buler was not only unauthorized, but *made under an imposition
*56] practised on them by Kyger, who prevailed on them to consider the contract as obliging them to value the lands on Elkhorn and Eagle Creek, at no more than one dollar per acre, although they might be worth more. That Josiah Watson never admitted that Kyger was entitled to more than the Elkhorn and Eagle Creek land, which was, therefore, not conveyed to his assignees, though the other lands mentioned in the bill were so conveyed. The defendant consents that a conveyance be decreed for the Elkhorn and Eagle Creek lands, and insists, that the bill as to the residue ought to be dismissed.

Several depositions were taken, which generally estimate the Elkhorn and Eagle Creek land at a dollar or more per acre. One deposition estimates them at 83 cents. Parts of those lands were sold by Kyger, at various prices, whether on credit, or on what credit, is not stated, averaging rather more than one dollar per acre. The deposition of McWhattan was taken by the defendant, and states that the valuers acted under the first agreement; and to the best of his recollection, thought themselves bound to estimate the first-rate land at not more than one dollar per acre.

The court decreed a conveyance for all the lands cantained in the valuation, from which decree the defendant appealed to this court. The appellant contends: 1st. That the second contract ought to be annulled, having been
*57] obtained by fraud. If this be against him, then, *2d. The valuation ought to be set aside, and a re-valuation directed.

1. Admitting the lands on Elkhorn and Eagle creek to have been worth, intrinsically, one dollar per acre, a fact not entirely certain, the court is of opinion, that the second contract is not impeachable on that ground. It is not suggested, nor is it to be presumed, that Watson derived his sole knowledge of the value of his lands from the representations made by Kyger. The value fixed in the first contract was probably founded on his previous information, and there is no reason to doubt, that when Kyger was dissatisfied with the stipulated price, Watson was perfectly willing to leave the value to arbitrators mutually chosen by the parties. The court perceives no reason for annulling the second contract.

2. On the second point, the establishment of the valuation made by McWhattan and Buler, there is a total want of testimony. The defendant, in his answer, denies the authority of McWhattan to act as a valuer, and there is no proof to support the allegation of the bill. The *ex parte* affidavit of McWhattan and Buler, did it even contain any evidence of their authority, is inadmissible; and the recitals of the deed of release, executed by Watson, after he became a bankrupt, are not evidence. The decree, therefore, so far as it establishes this valuation, and orders conveyances to be made in conformity with it, must be reversed, and that valuation set aside and a new one directed.

Decree accordingly.

*The Diana.

Damages.

Decree, in an instance cause, affirmed, with damages at the rate of six *per cent.* per annum, on the amount of the appraised value of the cargo (the same having been delivered to the claimant on bail), including interest from the date of the decree of condemnation in the district court.

Appeal from the Circuit Court of South Carolina. This was an information under the non-importation laws, against the ship Diana and cargo. Condemnation was pronounced in the district and circuit courts, and the cause was brought by appeal to this court. At the last term, on the hearing, it was ordered to further proof; and the further proof not being satisfactory, the decree of the court below, was affirmed, at the present term.

February 10th, 1818. *Berrien*, for the United States, inquired, whether the damages should be computed from the date of the bond given for the appraised value of the cargo, or from the decree of the district court.

The Court was of opinion, that the damages should be computed at the rate of six *per centum* on the amount of the appraised value of the cargo, including interest from the date of the decree of condemnation in the district court.

Decree affirmed.

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*The New York: Troup, Claimant. [*59

Non-importation.—Collusion.

Libel under the non-importation acts. Alleged excuse of distress repelled. Condemnation pronounced.[1]

February 5th, 1818. This cause was argued by *D. B. Ogden*, for the appellant and claimant, and by *Hopkinson* and *Baldwin*, for the United States.(*a*)

(*a*) The latter counsel cited The Eleanor, Edwards 159, 160. In this case, Sir William Scott observes, that, "real and irresistible distress must be, at all times, a sufficient passport for human beings, under any such application of human laws. But if a party is a false mendicant, if he brings into a port a ship or cargo, under a pretence which does not exist, the holding out of such a false cause fixes him with a fraudulent purpose. If he did not come in for the only purpose which the law tolerates, he has really come in for one which it prohibits, that of carrying on an interdicted commerce, in whole or in part. It is, I presume, an universal rule, that the mere coming into port, though without breaking bulk, is *primâ facie* evidence of an importation. At the same time, this presumption may be rebutted; but it lies on the party to assign the other cause, and if the cause assigned turns out to be false, the first presumption necessarily takes place, and the fraudulent importation is fastened down upon him. The court put the question to the counsel, whether it was meant to be argued, that the bringing a cargo into an interdicted port, under a false pretence, was not a fraudulent importation, and it has not been denied, that it is to be so considered." "Upon the fact of importation, therefore, there can be no doubt; and consequently, the great point to which the case is reduced, is the distress which is alleged to have occasioned it. Now, it must be an urgent distress; it must be something of grave necessity; such as is spoken of in our books, where a ship is said to be driven in by stress of weather

[1] And see The Æolus, *post*, p. 892.

*February 10th. LIVINGSTON, Justice, delivered the opinion of the court.—This is an appeal from the circuit court for the southern district of New York. This ship was libelled for taking on board, at the Island of Jamaica, with the knowledge of the master, 51 puncheons of rum, 23 barrels of limes, and 20 barrels of pimento, with intention to import the same into the United States, contrary to the provisions of an act of congress interdicting commercial intercourse between Great Britain and the
*61] United States, *passed the 1st of March 1809, and the cargo was libelled for an importation into the United States, in violation of the provisions of the same law.

A claim was interposed by John Troup, of the city of New York, merchant, which denies the allegation of the libel, as to the intention with which the articles mentioned in the libel were put on board at Jamaica; and as to the importation, he states, that on or about the 6th of October 1811, the said ship, with the said cargo on board, being on the high seas, on the American coast, about five leagues distant from land, and having lost her rudder, and being otherwise disabled, was, by stress of weather, compelled to put into the port of New York, contrary to the will and design of the master, and against the express orders of the claimant, as owner thereof, communicated to the said master before his arrival.

On board the vessel, were two manifests of the cargo, both of which stated the cargo to have been laden on board at Montego bay, in Jamaica; but one of them declared her destination to be Amelia Island, and the other New York. The latter was delivered to an officer of the customs, and a certificate by him indorsed thereon, stating that fact, dated the 14th October 1811. The other manifest was exhibited at the custom-house in New York, on the 25th October 1811, at which time, the master took the oath usual on such occasions, stating that the said manifest contained a true account of all the goods on board, and that there were not any goods on board, the importation of which into the United States, was prohibited by law.

*62] *John Davison, the master, deposed, that he was with the said ship, at Jamaica, in August 1811. That his orders from the claimant were, not to take on board at Jamaica, any West India produce, for the United States. That the consignee of the said ship, the Northern Liberties

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It is not sufficient, to say, that it was to avoid a little bad weather, or in consequence of foul winds; the danger must be such as to cause apprehension in the mind of an honest and firm man. I do not mean to say, that there must be an actual physical necessity, existing at the moment; a moral necessity would justify the act; where, for instance, the ship has sustained previous damage, so as to render it dangerous to the lives of the persons on board to prosecute the voyage. Such a case, though there might be no existing storm, would be viewed with tenderness; but there must be, at least, a moral necessity. Then, again, where the party justifies the act upon the plea of distress, it must not be a distress which he has created himself, by putting on board an insufficient quantity of water, or of provisions, for such a voyage; for there, the distress is only a part of the mechanism of the fraud, and cannot be set up in excuse for it. And in the next place, the distress must be proved by the claimant in a clear and satisfactory manner; it is evidence which comes from himself, and from persons subject to his power, and probably involved in the fraud, if any fraud there be, and is, therefore, liable to be rigidly examined."

(evidently a mistake for the New York), insisted upon it, that he should take a cargo of West India produce on board, stating it, as his opinion, that the non-intercourse law would probably be repealed, before he could arrive at New York, and that, at any rate, he could stand off and on Sandy Hook, until he should receive the orders of his owner how to proceed. That he was thus induced to take the said cargo on board, with which he sailed with orders from the consignee, and with intention to obey them, not to attempt to come into the port of New York unless he received from the owner directions, off Sandy Hook, so to do; that on the 6th of October, in the same year, while on the voyage from Jamaica, they had a severe gale of wind from the south-west, varying to the southward and eastward, accompanied with a very heavy sea, which continued nearly twenty hours, in the course of which, they split the fore-sail and carried away the rudder. That on the 11th of October, they made soundings, about 40 miles to the southward of Sandy Hook, where he received a letter from the owner, by a pilot-boat, the contents of which he communicated to the crew, and told them he should wait off the Hook, until he received further orders from the owner; but they declared, that the rudder was in such a state, that it was unsafe to remain in her at sea, and that they would leave the *ship in the pilot-boat, unless he would bring her into port. That, in his opinion, it would have been dangerous and very unsafe to continue at sea with the said ship, in the condition in which the rudder then was, and he, therefore, consented to bring her into New York, believing that it was necessary to do so, for the preservation of the cargo, and the lives of the people on board; that he was towed into New York by a pilot-boat, as the pilot would not take charge of the ship, unless she was towed. [*63

The letter of the owner, referred to in the master's testimony, is dated in New York, the 3d of October 1811, and is addressed to him, as follows:

"Not knowing if you have rum in, I take this precaution by every boat; if you have rum, you are to stand off immediately, at least four leagues, and keep your ship in as good a situation as you can, either for bad weather, or to come in, if ordered; you must get the pilot to bring up all the letters for me, &c., also, a letter from yourself, stating the state of your ship, provisions, &c., and bring them to town as soon as possible; give me your opinion of your crew, if you think they can be depended on, if we find it necessary to alter our port of departure. If you have rum in, I expect the ship must go to Amelia Island, or some other port, as they seize all that comes here. You may expect to see or hear from me, in a day or two after your being off, you keeping the Highlands N. W. of you, I think, will be a good berth. If you are within three leagues of the land, you are liable to seizure by any armed vessel."

On the 18th of October 1811, a survey was made *of the New York, by the board of wardens, which stated the rudder gone, the stern-post and counter-plank injured, the oakum worked out, the main-cap split and settled, fore-topsail yards sprung, pall-bits broken, fore-topsail sheet bill, started and broken. This injury was stated by the master to the wardens to have happened in a gale, in lat. 27° 30″ N. and long. 80° W. The wardens gave it as their opinion, that the said vessel ought to be unloaded and hove out, to repair her damages, before she could proceed to sea in safety. On the 7th of November, of the same year, after the [*64

New York was unloaded, the wardens again surveyed her, and reported, the middle rudder-brace broken, the crown of the lower brace gone. Some of the sheathing, fore and aft, gone, the rudder badly chafed, and so much injured, as not to be fit to be repaired.

On this evidence, the district court pronounced a decree of restitution. From this sentence, the United States appealed to the circuit court, held for the southern district of New York, in the second circuit, where that sentence was reversed. From this last decree, an appeal is made to this court, whose duty it is now to inquire, which of these sentences is correct.

If the articles in question were taken on board, with the intention of importing the same into the United States, and with the owner's or master's knowledge, a forfeiture of the vessel must be the consequence, whether she were forced in by stress of weather or not; and even if no such intention existed, at the time of loading at Jamaica, the same consequence
*65] *will attach to the goods, if it shall appear that the coming in of the vessel was voluntary on the part of the master.

The claimant has first endeavored to clear the transaction of all illegality in its inception, and thinks he has offered testimony sufficient to satisfy the court, that there was no intention, at the time of lading at Jamaica, to import the cargo into the United States.

When an act takes place, which, in itself, and unexplained, is a violation of law, and the inducements to such infraction are great, it will not be thought unreasonable in a court, to expect from a party, who seeks relief against its consequences, the most satisfactory proof of innocence, especially, as such proof will generally be within his reach. If then, any papers, which in the course of such a transaction must have existed, are not produced, or if any others which come to light, do not correspond with the master's relation; and especially, if all the witnesses are in the power, and many of whom, in the interest, and under the influence, of the party, are omitted to be examined, when it is impossible that they should not be intimately acquainted with the most material circumstances, and instead of this, the chief, if not only reliance of the claimant, is placed on the evidence of the party, who, if the allegations of the libel be true, is himself liable to a very heavy penalty; when such a case occurs, a court must be expected to look at the proofs before it, with more than ordinary suspicion and distrust.

In this case, there was an importation which *prima facie* was against law,
*66] and was in the same degree *evidence of an original intention to import; the burden, then, of showing the absence of such an intention was thrown upon and assumed by the claimant. In doing this, he satisfies himself with the examination of the master; who states, that he had orders from his owner, not to take on board, at Jamaica, any West India produce, for the United States. What is become of these orders? Does a master sail on a foreign voyage, with verbal instructions only? This is not the common course of business. Instructions to a master of a vessel are generally in writing; and for the owner's greater security, there is always left with him, a copy certified or acknowledged by the former. If so, why are they not produced? They would speak for themselves, and be entitled to more credit than the declarations of a person so deeply interested to misrepresent the transaction, as this witness is. The court, therefore, might well throw out of the case the little that is said of these instructions,

so long as they are not produced; and it is not pretended, that they were not reduced to writing, or if they were, that they are lost; which, indeed, is not a very supposable event, if the ordinary precautions on this occasion have been observed.

But notwithstanding these very positive orders, the master, in direct violation of them, and at the hazard of the most serious consequences to himself, takes on board a cargo, expressly prohibited by his owner, in compliance with the directions and opinion of a consignee, whose name is also withheld, and who does not appear to have had any right to interfere in this way. So great a responsibility would have attached, upon such a palpable breach of orders, that it is a good reason for doubting whether [*67 they ever existed. Nor is this part of the master's testimony verified by the claim, which observes a profound silence in relation to these or any other orders, that may have been given. If no written instructions were delivered to the master, which we are at liberty to believe, as none are produced, a better mode could hardly have been devised to avoid detection.

It has been said, in argument, that the intention of the master's coming to the United States was altogether contingent, and depended on a repeal of the non-intercourse act, and that he, accordingly, did not mean to come in, if that act were still in force. But how does this appear? Nothing of the kind is stated in his deposition; on the contrary, his coming in, according to his own account, depended, not on the repeal of this law, but on the orders of his owner; he came, he says, on this coast, with intention to obey the orders of the consignee, not to attempt to come into port, unless he received orders from the owner, off Sandy Hook, so to do. If, therefore, he had found those laws yet in force, which he probably had heard was the case, soon after his coming on the American coast, and long before he fell in with the pilot-boat which carried down the letter of his owner, he still intended to have come in, if his owner had ordered him so to do. His intention, therefore, as taken from his own relation, is not altogether of that innocent nature which it has been represented to be. When the vessel sailed from Jamaica, does not exactly appear; all we know from the master's account is, that she was there in August, and met with a gale on the 6th *of October following. It is probable, however, from these dates, that [*68 she had been long enough at sea, to meet with one or more vessels from the United States, from which information might have been received of the actual state of things in this country in relation to to this law. Whether any such vessel were met with, we know not; but might have known, if any of the crew or of the passengers had been examined, or the log-book produced. If such information were received on the coast, and the master of the New York had persisted afterwards in keeping the sea, until he could hear from his owner, it would amount to strong proof of an original design to come here.

The opinion which has already been intimated on this part of the case, which depends on the intention with which the cargo was loaded, will be much strengthened, by proceeding to consider the plea of necessity, on which the coming in is justified, and the facts relied on, in support of this plea. The necessity must be urgent, and proceed from such a state of things as may be supposed to produce on the mind of a skilful mariner, a well-grounded apprehension of the loss of vessel and cargo, or of the lives of the crew. It

is not every injury that may be received in a storm, as the splitting of a sail, the springing of a yard, or a trifling leak, which will excuse a violation of the laws of trade. Such accidents happen in every voyage; and the commerce of no country could be subject to any regulations, if they might be avoided, by the setting up of such trivial accidents as these. It ought, also, to be very
*69] apparent, that the injury, whatever it may be, has not *been in any degree produced, as was too often the case, during the restrictive system, by the agency of the master, and some of the crew. Does, then, the testimony in this case, carry with it that full conviction of the *vis major* which ought to be made out, to avoid the effects of an illicit importation? It will not be right or proper for the court, in considering this part of the case, to divest itself of those suspicions which were so strongly excited in the first stage of this transaction; for if it were not very clearly made out, that the lading of these goods on board was innocent, it will be some excuse for the incredulity which the court may discover respecting the tale of subsequent distress. On this point, also, the claimant is satisfied with the testimony of the master. Not a single mariner, not one of the passengers, although several were on board, is brought forward in support of his relation. Of the wardens' survey, notice will presently be taken. Now, admitting the master's story to be true, with those qualifications, however, which are inevitable, he has made out as weak a case of necessity as was ever offered to a court, in the many instances of this kind which occurred during the existence of the restrictive system. A gale of less than twenty hours continuance was all the bad weather that was encountered, in which it is said, the rudder was carried away and the fore-sail split; the rudder may have been injured, but it could not have been carried away, if it be true, as from the master's own account must have been the case, that the vessel, after this accident, made at least one thousand miles, in the course of the first five days,
*70] immediately after. But it is said, *that is no evidence as to the place where the accident happened. Of this fact, the survey produced by the claimant himself is conclusive. It was taken from the mouth of the master himself, and if he, or the wardens, committed a mistake in this important particular, why was it not corrected by an examination of the master, or a production of the log-book? Nor has it escaped the attention of the court, that if the New York were disabled in lat. 27° 30″ north, long. 80° west, she might have reached Amelia Island, her pretended port of destination, with much more ease, and in much less time than she employed in sailing more than ten degrees to the north, and taking her station off Sandy Hook; for she was, on the 6th of October, much nearer to that island, and the wind was as fair as could be desired to carry her there. The plea of distress, therefore, is contradicted by a fact which could not have existed, if it had been as great as is now pretended; nor can it be believed, if any great danger had been produced by the gale of the 6th of October, that either the crew or the passengers would have submitted, not only to come so many degrees to the north, but continue hovering on the coast, until the owner could be heard from. No leak appears to have been the consequence of the storm, no mast was lost, nor any part of the cargo thrown overboard; and if she steered and sailed as well as it seems she did, without a rudder, even a loss so very essential and serious to other vessels, must be allowed to have worked little or no injury whatever in this case.

The New York.

To the subsequent surveys by the *wardens of the port, so far as they exhibit the condition of the New York, but little importance is to be attached. It appears to have been an *ex parte* proceeding, and if all the injuries which they describe existed, as they no doubt did, it is not certain, whether they were produced by the gale spoken of, or by any other accident at sea, or by the act of the master himself; and at any rate, their recommending repairs, before she went to sea again, was very natural, the vessel being then in port; but is no proof at all, that she might not as well, and better, have gone to Amelia Island, as have come to that port.

The letter to the master, which has been produced, does not place in a very fair light the pretensions of the claimant. However unpleasant the task, the court is constrained to make some remarks on it. It seems agreed, that it is but little calculated to lull the suspicions which other parts of this case have excited. The interpretation resorted to by the claimant, is at variance with the only appropriate sense of the terms which are used, and with the most manifest intentions of the writer. By changing the port of departure, nothing else could have been intended, than to legalize the voyage, by the crew swearing that the New York had sailed from some West India possession, not under the dominion of Great Britain. This sense of the letter, which seems inevitable, is but little favorable to the character of the claimant, or to the integrity of the transaction. Nor should it be forgotten, that the master does not decide upon coming in, until this letter is received; whereas, if his situation were as perilous as he now represents it, he could not, and would not *have waited for orders. [*72

It is unnecessary to rely much on the two manifests; although one of them, bearing on its face a destination for New York, is certainly much at variance with the pretended contingent destination of this vessel. The oath which the master made at the custom-house, that no goods were on board of the New York, the importation of which was prohibited by law, was not only false, but is an evidence of very great incaution on his part; for if the collector would administer the oath in no other form, it was no reason whatever for his attesting to a fact, the falsity of which was apparent on the very manifest which was attached to the oath.

The alleged opposition of the crew to wait for further orders, and their threats to come up in the pilot-boat, have not been overlooked. This allegation depends altogether on the credit due to the master, and is a circumstance not very probable in itself. No pilot, in the then condition of the New York, could have been so ignorant, and so regardless of his duty, as to take from her, without the master's consent, any part, much less the whole, of her crew. If the threat, therefore, were really made, the master ought not to have been alarmed at it, and probably, would have treated it with contempt, if it had not been suggested by himself, or had not suited his then purpose; at any rate, if by remaining longer at sea than he ought to have done, or by hovering on the coast, in expectation of orders from his owners, after having received so many injuries on the 6th of October, any additional danger were produced, or well-grounded apprehensions and opposition on the part *of the crew, he would not, without great reluctance on the part of the court, be permitted to draw any very great advantage from a circumstance which his own imprudence, if not his own fault, occasioned. [*73

The towing of the New York into port by a pilot-boat, is supposed to be a circumstance which must have proceeded from her disabled condition. This does not follow. It may have proceeded from the request of her master; for it can hardly be believed, that a vessel that had behaved so well, after the gale of the 6th of October, and which is not stated to have met with any injury from subsequent causes, should, the moment it was necessary to take a pilot on board, be so ungovernable, as to require towing into port. If this were really the case, it is a matter of some surprise, that the claimant should not have recourse to the pilot himself, to establish the fact, and the reason of it.

Notwithstanding the untoward circumstances, which have already been taken notice of, and the temptations which existed to commit violations of the restrictive laws, which it is known were great, and led to frequent infractions of them, the court is asked to acquit this property, without producing the letter of instructions to the master, or the orders to the consignee in Jamaica, where it is alleged there was one, although his name is not given, nor any bill of lading, or invoice or log-book, and in the face of two manifests, the one purporting a destination contrary to law. To expect an acquittal, in a case involved in so much mystery, it is not too much to say, that the uncommon circumstances attending it should have been explained
*74] *and accounted for in the most satisfactory manner. But when, for this explanation, the court is referred to the unsupported testimony of the master, who is himself the *particeps criminis*, if any offence have been committed, and who stands convicted on the papers before us, of a palpable deviation from truth, and whose account, if true, would have induced him and his crew to direct their course to Amelia Island, instead of encountering a more northern latitude, we must believe, that the mate and others, who might have proved the fact of distress, if real, beyond all doubt, were not produced, not from mere negligence or inattention, but from a conviction that they would afford no sanction to the master's relation. It is now near eighteen months since the decree of the circuit court was pronounced, in which an intimation was given, that further testimony would be admitted here, and yet none has been produced.

It is the opinion, therefore, of a majority of the judges, that the sentence of the court be affirmed, with costs.

JOHNSON, Justice. (*Dissenting.*)—This is a libel against the cargo of the ship New York. The vessel herself was libelled for lading a cargo, with intent to violate the laws of the United States; but the cargo in this case is libelled as forfeited, for having been imported into the city of New York, contrary to law. The intent with which it was laden on board becomes immaterial as to the cargo, except so far as it might operate to cast a shade of suspicion over the act of coming into port. The defence set up is, that
*75] the *ship sailed with the alternate destination to go into New York, if legal, and if not, to bear away for Amelia Island. That she was ordered to call off the port of New York for information; and in her voyage thither, she encountered a storm, from which she sustained such damage as to oblige her to put into New York for the safety of the lives of the passengers and crew. That a vessel, under such circumstances, has a right to call off a port for information, has been decided in various cases; and it has

also been decided, and is not now questioned, that if, in the prosecution of that voyage, she sustains such damage as renders it unsafe to keep the sea, she might innocently enter the ports of the United States to repair, and resume her voyage. The laws of the United States make provision, in such cases, for securing the cargo, to prevent an evasion of our trade-laws.

There are, then, but two questions in the case: 1st. Whether her actual state of distress was such as to make it unsafe for her to keep the seas? 2d. Whether that state of distress was the effect of design or accident? Admitting that the greatest frauds that can be imagined had been proven to have been in contemplation, yet, as the libel does not charge a lading, with intent to import into the United States, it is immaterial to this decision, to inquire what was intended, if it be made to appear, that the distress was real, and not pretended or fictitious. Now, so far as I can judge, the facts in this case are such as leave nothing for the mind to halt upon. The distress was obvious to the senses, and the nature of it such as could not have been produced by the ingenuity of man. Without dwelling *upon less important particulars, it appears, from the surveys, that the fore- [*76 topsail yards were sprung; the main-cap split and settled; and the rudder carried away, or, in the words of the survey, gone; and the stern-post, after-sheathing, and counter-plank much chafed. These words carried away and gone, mean, in nautical language, wholly disabled or rendered useless. And that such was the state of the rudder is evident, from the contents of the surveys. For, when the vessel was hove keel out, it appeared, that the middle rudder-brace was broken, and the crown of the lower brace gone; so that it is evident, that the rudder must have swung in the chains. And that this was the case, appears from several particulars, also gathered from the surveys: 1st. The impossibility, on any other supposition, to believe, that the surveyors would, on the first survey, before the vessel was hove down, report the rudder gone. 2d. The chafed state of the rudder and stern-post could only have been produced by the action of the rudder against the stern-post, when forced to and fro by the waves, and must have occurred at sea. And lastly, the same cause naturally produced the injury reported to have been done to her counter-plank and after-sheathing. These injuries, I repeat, could not have been done by the hand of man, especially, those sustained under water; and although I see neither fraud nor falsehood in the case, yet I care not though every word of the testimony, besides, be false: that falsehood could neither have produced these injuries, nor repaired them; and the evidence is sufficient, to show that the safety of *the lives of [*77 the passengers and crew required the vessel to put into port, and therefore, it was innocent.

In this opinion, I am supported by two of my brethren, the CHIEF JUSTICE, and Mr. Justice WASHINGTON.

Decree affirmed.

The SAMUEL: BEACH *et al.*, Claimants.

Examination of witnesses.

A witness offer to be examined *vivâ voce*, in open court, in an instance cause, ordered to be examined out of court.

THIS cause, being an instance or revenue cause, had been ordered to further proof at a former term. (1 Wheat. 9.)

February 30th, 1818. *Dagget*, for the claimants, now offered to produce a witness to be examined, *vivâ voce*, in open court, on further proof; but the court, for the sake of convenience, ordered his deposition to be taken in writing, out of court.

February 11th. MARSHALL, Ch. J., delivered the opinion of the court, reversing the decree of condemnation in the court below, and ordering the property to be restored as claimed.

Decree reversed.

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*78] *The SAN PEDRO: VALVERDE, Claimant. (*a*)

Probable cause.

Decree of restitution affirmed, with a certificate of probable cause, in an instance cause, on further proof.

THIS cause was ordered to further proof, at the last term. Further proof was produced at the present term, and the cause submitted thereon, without argument.

February 11th. MARSHALL, Ch. J., delivered the opinion of the court, affirming the decree of restitution in the court below, with a certificate of probable cause of seizure.

Decree affirmed.

(*a*) See 2 Wheat. 132, 142.

The Star: Dickenson *et al.*, Claimants.

Condemnation.—Reciprocity.

An American vessel was captured by the enemy, and after condemnation and sale to a subject of the enemy, was re-captured by an American privateer: *held*, that the original owner was not entitled to restitution, on payment of salvage, under the salvage act of the 3d of March 1800, and the prize act of the 26th of June 1812.

*By the general maritime law, a sentence of condemnation completely extinguishes the title of the original proprietor. [*79

By the British statute of the 13 Geo. II., ch. 4, the *jus postliminii* is reserved to British subjects, upon all re-captures of their vessels and goods, by British ships, even though they have been previously condemned, except where such vessels, after capture, have been set forth as ships of war.

The statute of the 48 Geo. III., ch. 160, § 39, has no further altered the previous British laws, than to fix the salvage at uniform stipulated rates, instead of leaving it to depend upon the length of time the re-captured ship was in the hands of the enemy.

Neither of these statutes extend to neutral property.

The 5th section of the prize act of the 26th June 1812, does not repeal any of the provisions of the salvage act of the 3d of March 1800, but is merely affirmative of the pre-existing law.

By the law of this country, the rule of reciprocity prevails, upon the re-capture of the property of friends.

The law of France, denying restitution upon salvage, after 24 hours possession by the enemy, the property of persons domiciled in France is condemned as prize, by our courts, on re-capture, after being in possession of the enemy that length of time.

Appeal from the Circuit Court for the district of New York. It appeared by the libel, claim, evidence and admissions of the parties in this cause, that the ship Star was captured by the American privateer Surprise, on the high seas, on the 27th of January 1815. That the ship Star was then on a voyage from the British East Indies to London. That she was under the British flag, had British papers as a trading vessel, and a license from the British East India company, and that her ostensible owners were British subjects, residing in London. It further appeared, that previously to the late war, and until, and at the time of the capture and condemnation in the British *court of admiralty hereinafter mentioned, the said ship was a duly registered American ship, and was owned by Isaac Clason, [*80 deceased, an American citizen, residing in New York, or by the claimants, his executors, who were also American citizens, residing in New York.

That soon after the commencement of the late war, the said ship sailed from the United States on a foreign voyage, and immediately after leaving a port of the United States, on the said voyage, was captured by a British vessel of war, and carried into Halifax, Nova Scotia, where she was regularly libelled and condemned as prize, in the court of vice-admiralty of that province; after which, she was purchased by the British subjects who claimed to own her at the time she was re-captured by the Surprise. This last-mentioned capture having been made, the ship Star was brought into the port of New York, and libelled in the district court of New York as prize to the said privateer; upon which libel, the appellants put in a claim, claiming the said ship as the property of their testator, and claiming to have the said ship restored to them, upon the payment of salvage; which claim was rejected, and the ship was condemned. The cause was then carried to the circuit court, where the decree of the district court was affirmed. It was then brought, by appeal, to this court.

February 11th. *Key*, for the appellants and claimants.—The question

in this cause arises under the prize act of the 26th of June 1812, § 5, which,
*81] it is contended, *repeals the salvage act of 1800, as to this matter. The latter act provides, that condemnation in the enemy's prize courts shall be a bar to restitution on salvage to the original owner. The 5th section of the prize act of 1812, declares, "that all vessels, goods and effects, the property of any citizen of the United States, or of persons resident within, and under the jurisdiction of, the United States, or of persons permanently resident within, and under the protection of any foreign prince, government or state, in amity with the United States, which shall have been captured by the enemy, and which shall be re-captured by vessels commissioned as aforesaid, shall be restored to the lawful owners, upon payment by them, respectively, of a just and reasonable salvage, to be determined by the mutual agreement of the parties concerned, or by the decree of any court of competent jurisdiction, according to the nature of each case, agreeably to the provisions heretofore established by law." This section directs all vessels, goods and effects of citizens and neutrals, re-captured from the enemy, to be restored, on payment of salvage, without reference to the fact, whether they had been previously condemned or not; and so far it modifies and repeals the salvage act of 1800. The original owner is, therefore, entitled to restitution, notwithstanding the British condemnation. Upon any other interpretation, the entire section would become wholly inoperative, as every case is included in the previous act of 1800. When that act passed, our law conformed to the English rule, which then prevailed. Eng-
*82] land subsequently altered her law, and our act *of 1812 copied the British statute of the 43 Geo. III.(*a*) That act must have been intended to make some change in the existing legislation on the subject; and it is probable, that congress meant to make a distinction between re-captures by public ships and by private ships, unfavorable to the latter. The "provisions heretofore established," do not refer to all the provisions of the act of 1800; these words merely refer to the rate of salvage fixed by that act, and not to the principle of restitution. The latter is changed; the former remains unaltered.

Winder and *Harper*, contrà.—The act of 1800 was not a prize act for privateers. The provision in the act of 1812 is merely incidental, and refers to the pre-existing law. Our policy of 1812 was not like that of England, which contemplates the extreme probability of the re-capture of British vessels, even after condemnation by the enemy. Our object was to hold out the most liberal encouragement to cruising. The British salvage acts merely refer to the re-capture of British property; our act extends to neutral, as well as American property. The British statutes are merely an exception to the general rule, municipal and local; our law is founded on the law of nations. The construction contended for might extend to enforce a demand of restitution, after the lapse of an indefinite length of time, and after the
*83] intervention of repeated treaties of peace. *The act of 1800 is merely in affirmance of the law of nations, which universally divests the title of the original owner, after condemnation. The very term re-capture, implies former ownership still subsisting; but it does not subsist here. How

(*a*) Park on Insurance 94 (6th London ed.); 2 Marshall on Ins. 501; Horne's Compendium 84.

could the former owner be considered the "lawful owner," after condemnation? "The nature of each case" is to be determined by reference to the act of 1800, and imports something more than the mere rate of salvage. The contrary construction would make a distinction between public ships and privateers, unfavorable to the latter, contrary to the uniform policy of the country; and would create a confusion as to the re-capture of the property of friends, which it cannot be supposed the legislature intended to introduce. The equitable rule of reciprocity would be prostrated; and neutral property must, in all cases, be restored (after or before twenty-four hours' possession by the enemy), although the friendly power would not, in the same case, restore. Such a departure from the public law of the world, is not to be lightly presumed; and statutes made *in pari materia* are to be construed together, and nothing is to be repealed by mere implication that may stand consistently with former enactments.

Jones, in reply.—The claimants found their claim to restitution on payment of salvage, upon the 5th section of the act of the 26th of June 1812. The captors resist the claim, because the vessel was condemned before the re-capture, and contend, that the act of the 3d of March 1800, is the law which is to determine the rights of the parties. This seems, *in fact, [*84
to be contending that a prior law repeals a subsequent one. If the act of 1812 is taken by itself, there can be no doubt, but there must be restitution. But the captors insist that the words, "according to the nature of the case, agreeably to the provisions heretofore established by law," which are found in the act of 1812, refer to the act of 1800, so as to determine by that law, when restitution is, or is not, to be made. Yet, it seems obvious, that these words refer to that law only for the measure and rule of salvage. According to the law of 1812, property of a citizen of the United States, re-captured from the enemy, is liable to be restored, but it is to be restored upon the payment of salvage, agreeable to the nature of the case: and to determine the nature of the case, and for no other purpose, we are referred to the pre-existing laws. If the act of 1812 is to be construed, as the captors would construe it, then this fifth section is an absolute nullity. For, if the law of 1800 is to be resorted to, in order to determine, as well when restitution is to be made, as the salvage to be paid, there is no case in which the law of 1812 can have any operation. By the marine law of England, as it stood previously to any statute regulation on the subject, there could be no restitution, after condemnation; our law of 1800 adopted this principle. But by the English law, restitution is now to be made, in all cases, on the payment of salvage. The act of 1812 was doubtless intended to be in conformity to this just modification of the English law, of which it is almost a literal copy. There was good reason for this modification of the marine law, in respect to our privateers. The enemy had their courts of vice-admiralty *at our very doors; our vessels would be captured one day, and con- [*85
demned the next. The legislature did not intend, that the American owner should be deprived of his right of restitution, by a condemnation, when there would be no more merit in re-capturing a vessel that had been condemned, than one that was not. There might have been reason for distinguishing between captures by our public and by private armed vessels. It was to be supposed, that our privateers would be cruising about the ports

of the enemy, in our neighborhood, and would be likely to re-capture American property, recently captured and recently condemned. The employment of our men of war, it might have been contemplated, would be more distant and difficult. Why should the condemnation have any effect as to the right of restitution, when the property is re-captured from the hands of an enemy? The law, as to restitution on salvage, would have no operation, if the property, after condemnation, came to the hands of a citizen or a neutral, because then there could be no re-capture. To let the title to restitution depend on the condemnation, is to let the right of the citizen depend on the act of the enemy.

February 16th, 1818. STORY, Justice, delivered the opinion of the court.— This is the case of an American ship, captured by the enemy, during the late war, and after condemnation and sale to an enemy merchant, re-captured by the American private armed ship Surprise. And the question is, whether,
*86] under these circumstances, *the ship is to be restored, on salvage, to the former American owner, or condemned as good prize of war? If the case were to stand on the general salvage act of 1800, in cases of re-capture (act of 3d of March 1800, ch. 14), it is perfectly clear, that the claimants are barred of all right; for that act expressly excepts from its operation, all cases where the property has been condemned by competent authority. The same result would flow from the principles of the law of nations. It is admitted, on all sides, by public jurists, that in cases of capture, a firm possession changes the title to the property; and although there has been, in former times, much vexed discussion as to the time at which this change of property takes place, whether on the capture, or on the pernoctation, or on the carrying *infra præsidia*, of the prize; it is universally allowed, that at all events, a sentence of condemnation completely extinguishes the title of the original proprietor, and transfers a rightful title to the captors or their sovereign. It would follow, of course, that property re-captured from an enemy, after condemnation, would, by the law of nations, be lawful prize of war, in whomsoever the antecedent title might have vested.

It is supposed, however, that the provisions of the salvage act of 1800, ch. 14, are materially changed, in cases of captures by private armed ships, by the fifth section of the prize act of the 26th of June 1812, ch. 107. That section declares, "that all vessels, goods and effects, the property of any citizen of the United States, or of persons resident within and under the protection of
*87] the United States, or of persons *permanently resident within, and under the protection of any foreign prince, government or state, in amity with the United States, which shall have been captured by the enemy, and which shall be re-captured by vessels commissioned as aforesaid, shall be restored to the lawful owners, upon payment by them, respectively, of a just and reasonable salvage, to be determined by the mutual agreement of the parties concerned, or by the decree of any court of competent jurisdiction, according to the nature of each case, agreeably to the provisions heretofore established by law." The argument is, that as the section directs all vessels, goods and effects of citizens and neutrals, re-captured from the enemy, to be restored, without any reference of the fact, whether they had been previously condemned or not, it so far qualifies and repeals the salvage act of 1800; and that, consistently with this construction, the words "agreeably to the

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provisions heretofore established by law," may and ought to be referred to the rate of salvage fixed by the act of 1800, and not to the provisions of that act generally. In support of this argument, it has been urged, that upon any other construction, the whole section becomes completely inoperative, as every case is embraced in the previous law. That congress may well be presumed to have intended to make a discrimination between cases of re-capture by public and private ships of war, unfavorable to the latter; and that congress may had in view, a conformity to the British prize code, which, since the passing of the act of 1800, had been changed in the manner now contended for by the claimant.

*The argument asserted from the British prize code, certainly, [*88 cannot be supported upon the notion of any supposed recent change in the law relative to re-captures. So early as the reign of George II., the *jus postliminii* was, by statute, reserved to British subjects, upon all re-captures of their vessels and goods, by British ships, even though a previous condemnation had passed upon them, with the exception of cases where such vessels, after capture, had been set forth as ships of war. The statute of 43 Geo. III., ch. 160, § 39, has no further altered the previous laws, than to fix the salvage at uniform stipulated rates, instead of leaving it to depend upon the length of time the re-captured ship was in the hands of the enemy. And the terms of this statute are very different from the language of the fifth section of our prize act of 1812, and expressly exclude from its operation and benefits all neutral property.

In respect to the legislative intention, it is extremely difficult, to draw any conclusion unfavorable to private armed ships, from the language or policy of the prize act, or any subsequent act of congress passed during the war. The bounties held out to these vessels, not only by the prize act, but by other auxiliary acts, manifest a strong solicitude in the government to encourage this species of force. But we are not at liberty to entertain any discussions in relation to the policy of the government, except so far as that policy is brought judicially to our notice, in the positive enactments, and declared will of the legislature. We must interpret, therefore, this clause of the prize act by the general rules of construction applicable to *all [*89 statutes; and in this view, we are of opinion, that the doctrine contended for by the claimant ought not to prevail.

In the first place, the section in question contains no repealing clause of any of the provisions of the salvage act of 1800, and therefore, the whole laws on this subject are to be construed together, and unless so far as there is any repugnancy between them, are to be considered as in full force. That the section is free from all doubt in its language, need not be asserted; but that every portion of it may, by fair rules of interpretation, be deemed merely affirmative of the existing law, is, with great confidence, maintained. There is no repugnancy which requires or even affords a presumption of legislative intent to repeal any portion of the salvage act. It is true, that the section declares that *all vessels, goods and effects* re-captured, shall be restored; but to whom are they to be restored? Certainly, by the very terms of the act, to the "lawful owners," which, to prevent the most injurious, and we had almost said absurd, consequences, must mean the "lawful owners," at the time of the re-capture. But the lawful owner of re-captured property, which has been already lawfully condemned, is not the

original proprietor, but the person who has succeeded to that title, under the decree of condemnation. Suppose, the property at the time of the capture had belonged to one neutral, and after condemnation, had been sold to another neutral, and then captured and re-captured by the enemy, can there be a doubt, that the latter is, to all intents and purposes, the true and lawful owner, and that he may assert his *title against the first proprietor? Besides, re-capture, by force of the term, would seem most properly applied to cases where an inchoate title only was vested by capture. Can it be said, in strict propriety of language, that property captured from an enemy, which at the time is the lawful property of an enemy purchaser, is re-captured from his hands? The re-capture is always supposed to be from those who are the original captors, not from persons who have, by operation of law, succeeded to the title acquired under a decree of condemnation.

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The section, however, does not stop here; nor is it necessary to rest its construction upon the import of a few detached terms. It proceeds to declare, that the re-captured property shall be restored to the lawful owners, upon payment of a reasonable salvage, "according to the nature of each case, agreeably to the provisions heretofore established by law." Here is a direct and palpable reference to the salvage act, not for the purpose of repeal, but for the purpose of recognising it as in full force in respect to all cases of re-capture. It is argued, that the reference is confined to the mere rates of salvage established by that act. Let us see, whether, consistently with any supposed legislative intention, or any reasonable principle, such a construction can be sustained. In the first place, it would make a discrimination between re-captures of property belonging to the United States, and property belonging to neutrals and citizens, wholly unaccountable, upon any principles of national policy. In case of a previous condemnation, the property, if belonging to citizens or neutrals, would be restored on salvage; if belonging *to the United States, it would be wholly condemned as good prize of war. In the next place, the property of neutrals and citizens, if re-captured by public ships, would be good prize; but if re-captured by private armed ships, would be restored on salvage. Yet, in respect to neutrals or citizens, if the intention was to confer a benefit on them, the reason would seem equally to apply to both cases. And if there was a policy in discouraging captures by privateers, and encouraging captures by public ships, it is strange, that the legislature should not, in relation to captures, not within the purview of this clause, have made a similar discrimination. The reason would be the same, and yet, in those cases, the salvage act uniformly gives a higher rate of salvage to private armed ships than to public ships; and the prize acts superadd an exclusive bounty on prisoners of war captured by private armed ships, of no inconsiderable value. And whatever might be the case in relation to our own citizens, it is somewhat singular, that the legislature should be paying bounties out of the treasury, to encourage privateers, when they were in favor of neutrals, having no legal title, taking from them a large proportion of the lawful proceeds of prize.

*91]

There is yet another case which affords a more striking illustration of the difficulties which surround this construction. The salvage act of 1800 declares, that upon the re-capture of neutral property, the rule of reciprocity shall prevail. If the neutral would, in the like case, restore on salvage,

then the American courts are to restore on the same salvage: if otherwise, then they are to condemn. If, otherwise, by *the prize act of 1812, restitution is to be made in all cases of re-capture of neutral property, and yet, in the like cases, the neutral sovereign would not restore, it would follow that the restitution would be without payment of any salvage, which would be repugnant not only to the intent, but to the words both of the salvage act and the prize act, in any mode of interpretation. In a recent case in this court (*The Adeline*, 9 Cranch 244), condemnation passed upon some French property which, during the late war, had been captured by the enemy, and re-captured by an American privateer, upon the ground that the rule of reciprocity established by the salvage act of 1800, applied to the case; and as France would deny restitution, our courts were bound to apply the same principle to her. [*92

There does, not, therefore, seem any solid reason on which to rest the construction contended for by the claimant. And there are the most weighty reasons, founded upon public inconveniency, upon national law. and upon the very terms of the salvage and prize acts, for the contrary construction. In considering the section in question as merely affirmative, every difficulty vanishes, and the symmetry of a system, apparently built up with great care and caution, as well as in strict accordance with the received principles of public law, is maintained and enforced.

But it has been asked, if the section is merely affirmative, what reason can be assigned for its enactment? If no satisfactory answer could be assigned, it would not impair the force of the preceding reasoning. It is very common for the legislature to make laws in affirmance both of the common *and statute law. This very act gives the district court cognisance of captures, and yet it was clearly settled, that the courts already possessed the same jurisdiction. Doubts may and often do arise, how far a provision already in existence may be applied to cases contemplated in new statutes. To obviate such doubts, whether real or imaginary, is certainly not an irrational or unsatisfactory mode of legislation, and often prevents serious mischiefs, during the fluctuations of professional opinions, prior to a legal adjudication. It was probably to obviate some doubt of this sort, that the clause in question was inserted in the act. Nor is it difficult to perceive some room for subtle doubt from the generality of the preceding (§ 4) section. That section declares that "*all captures and prizes* of vessels and property shall be forfeited," and accrue to the owners, officers and crew of the capturing private armed ship; and from the generality of this language it might possibly (we do not say, upon any sound interpretation) have been doubted, whether the words "all captures" might not be held to comprehend captures of neutral property, which had not yet been condemned. At all events, upon every view of this case, the court are of opinion, that the property having been previously condemned and title passed to the enemy, and consistently with the salvage and prize acts, must be decreed to be good prize of war. [*93

Decree affirmed, with costs. (*a*)

(*a*) See 2 Wheat. App'x, note I., pp. 40–49. As by the salvage act of the 3d of March 1800, ch. 168, the rule *of reciprocity (or, as Sir WILLIAM SCOTT calls it, amicable retaliation) is the rule to be applied to cases of re-captures of the property of friendly [*94

nations, it may be useful, to state the provisions contained in the different maritime codes on this subject, or which have been substituted in their place by treaty.

The present British law of salvage is established by the act of the 48 Geo. III., ch. 160, the 39th section of which provides, that, "If any ship or vessel, taken as prize, or any goods therein, shall appear, in the court of admiralty, to have belonged to any of his majesty's subjects, which were before taken by any of his majesty's enemies, and at any time afterwards retaken by any of his majesty's ships, or any privateer, or other ship or vessel, under his majesty's protection; such ships, vessels and goods, shall, in all cases (save as hereafter excepted), be adjudged to be restored, and shall be accordingly restored, to such former owner or owners, he or they paying for salvage, if retaken by any of his majesty's ships, one-eighth part of the true value thereof, to the flag-officers, captains, &c., to be divided, &c. And if retaken by any privateer, or other ship or vessel, one-sixth part of the true value of such ships and goods, to be paid to the owners, officers and seamen of such privateer or other vessel, without any deduction. And if retaken by the joint operation of one or more of his majesty's ships, and one or more private ships of war, the judge of the court of admiralty, or other court having cognisance thereof, shall order such salvage, and in such proportions, to be paid to the captors, by the owners, as he shall, under the circumstances of the case, deem fit and reasonable. But, if such re-captured ship, or vessel, shall appear to have been set forth by the enemy as a ship or vessel of war, the said ship or vessel shall not be restored to the former owners; but shall, in all cases, whether retaken by any of his majesty's ships, or by any privateer, be adjudged lawful prize, for the benefit of the captors.

This rule, with respect to the property of British subjects, is applied to re-captures of the property of nations in amity with Great Britain, until *it appears that *95] they act towards British property on a less liberal principle; in such case, it adopts their rule, and restores, at the same rate of salvage, or condemns, under the same circumstances, in which their own law and practice restores or condemns. The Santa Cruz, 1 Rob. 5, 63.

By the most recent French law, if a French vessel be retaken from the enemy, after being in his hands more than twenty-four hours, if re-captured by a privateer, she is good prize to the re-captors; but if retaken before twenty-four hours have elapsed, she is restored to the owner, with the cargo, upon the payment of one-third the value for salvage, in case of re-capture by a privateer, and one-thirtieth in case of a re-capture by a public ship. But in case of re-capture by a public ship, after twenty-four hours possession, she is restored on a salvage of one-tenth.[1]

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[1] "Si aucun navire de nos sujets pris par nos ennemis, a été entre leur mains jusques à vingt-quatre heures, et après, qu'il soit recous et repris par aucuns de nos navires de guerre ou autres de nos sujets, la prise sera déclarée bonne: mais si ladite reprise est faite auparavant les vingt-quatre heures, il sera restitué avec tout ce qui étoit dedans, et en aura toutefois le navire de guerre qui l'aura recous et repris, le tiers." Ordonnance d'Henri III., en Mars 1584, art. 61. "Si aucun navire de nos sujets est repris sur nos ennemis, après qu'il aura demeuré entre leur mains pendant vingt-quatre heures, il sera restitué au propriétaire, avec tout ce qui étoit dedans à la reserve du tiers qui sera donné au navire qui aura fait la recousse." Ordonnance de 1681, liv. 3, tit 9, *des Prises*, art. 8. "Les règlemens concernant la recousse continueront d'être observés suivant leur forme et teneur; en conséquence, lorsque les navires de ses sujets auront été repris par les corsaires armés en course contre les ennemis de l'état, après voir été vingt-quatre heures en leur mains, ils leur appartiendront en totalité; mais dans le cas où la reprise aura été faite avant les vingt-quatre heures, le droit de recousse ne sera que du tiers de la valeur du navire recous et de sa cargaison. En ce qui concerne les reprises faites par les vaisseaux, frégates ou outres bâtimes de sa majesté, le tiers sera adjugé à son profit pour droit de recousse, si elle est faite dans les vingt-quatre heures; et après lédit délai, la reprise sera adjugée en totalité à sa majesté, sans que les états-majors des dits vaisseaux et frégates puissent y rien prétendre: se reservant sa majesté d'accorder aux équipages, une gratification proportionée à la valeur du bâtiment et de sa cargaison, d'après les connoisements et factures, comme aussi de donner aux états-majors des vaisseaux qui auront faites

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*Although the letter of the ordinances, previous to the revolution, condemns as good prize, French property re-captured after being twenty-four hours in possession of the enemy, whether the same be retaken by public or private armed vessels; yet it seems to have been the constant practice, in France, to restore such property, when re-captured by the king's ships. Valin, sur l'Ord., liv. 3, tit. 9, *Des Prises*, art. 3; Traité des Prises, ch. 6, § 1, n. 8, § 88; Pothier, *De Propriété*, n. 97; Emerigon, *Des Assurances*, tom. 1, p. 497. The reservation contained in the above ordinance of 1779, made the salvage discretionary, in every case, it being regulated by the king in council, according to the particular circumstances. Emerigon, Ibid.

France applies her own rule to re-captures of the property of friendly nations. Pothier, *De Propriété*, n. 100; Emerigon, *Des Assurances*, tom. 1, p. 499. By the Réglement of the 2 Praireal, 11th year, art. 54, this relaxation of the rule as to captures by public ships, is extended to allies, generally, so as to grant them restitution, after twenty-four hours' possession by the enemy, upon the payment of a salvage of one-tenth; but restitution on re-captures by public ships has always been made to the subjects of Spain on account of the intimate relation subsisting between the two powers, whilst it is refused even to them in re-captures by privateers. Azuni, part. 2, ch. 4, § 11; Bonnemant's Translation of De Habreu, tom. 2, p. 83, 84.

The French law also restores, upon payment of salvage, even after twenty-four hours' possession by the enemy, in cases where the enemy leave the prize a derelict, or it reverts to the original proprietor, in consequence of the perils of the seas, without a military re-capture. Ordonnance de 1681, liv. 3, tit. 9, *Des Prises*, art. 9; See 2 Wheat. app'x, p. 47.

*Spain formerly adopted the law of France, having taken its prize code from that country, with which it had been so long connected by the closest ties; and [*97 in the case of The San Iago (mentioned in The Santa Cruz, 1 Rob. 50), it was applied by the Lords of Appeal, upon the principle of reciprocity, as the rule in British re-captures of Spanish property. But by the Spanish prize ordinance of the 20th of June 1801, art. 38, it was modified, as to the property of friends, it being provided, that when it appears that re-captured ships of friends are not laden for enemy's account, they shall be restored, if re-captured by public vessels, for one-eighth, if by privateers, for one-sixth salvage: provided, that the nation to whom such property belongs, has adopted, or agrees to adopt, a similar conduct towards Spain. The ancient rule is preserved as to re-captures of Spanish property; it being restored, without salvage, if re-captured by a king's ship, before or after twenty-four hours' possession; and if re-captured by a privateer, within the twenty four hours, upon payment of one-half for salvage; if re-captured after that time, it is condemned to the re-captors. The Spanish law has the same provisions with the French, in cases of captured property becoming derelict, or reverting to the possession of the former owners by civil salvage.

Portugal had adopted the French and Spanish law in her ordinances of 1704, and of December 1796. But in May 1797, after the Santa Cruz was taken, and before the judgment in that case, Portugal revoked her former rule that twenty-four hours' possession divested the property, and allowed restitution, on salvage of one-eighth, if the re-capture was by a public ship, and one-fifth, if by a privateer. In The Santa Cruz, and its fellow cases, Sir W. Scott distinguished between re-captures made before and since the ordinance of May 1797; condemning the former, where the property had been

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les reprises, et qui auroient eu soin de se distinguer par des actions de valeur, telles graces ou récompenses que sa majesté avisera bon être, suivant les circonstances." Ordonnance de 15 Juin 1779. "Lorsque les bâtimens Français auront été repris par les vaisseaux de la republique, après avoir été 24 heures au pouvoir de l'ennemi, les bâtimens et leur cargaisons appartiendront en totalité aux équipages preneurs; mais dans le cas où la reprise aura été faite avant les vingt-quatre heures, le droit de recousse ne sera que du tiers de la valeur du navire repris et de sa cargaison." Loi d'Octobre 1798. By the réglement of the 2d of Praireal, year 11, art. 54, the rate of salvage on re-captures by public ships, before twenty-four hours' possession, was fixed at one-thirtieth.

twenty-four hours in the enemy's possession, and restoring the latter, upon payment of the salvage fixed by the Portuguese ordinances.

The ancient law of Holland regulated restitution on salvage, at different rates, according to the length of time the property had been in the enemy's *possession.
*98] Bynk. Q. J. Pub. lib. 1, ch. 5. But as between the United States and the Netherlands, this matter is regulated by the convention of 1782, the first article of which provides, that re-captured vessels of either nation, not having been twenty-four hours in possession of the enemy of either, shall be restored, on payment of one-third salvage, if re-captured by a privateer. By the 2d article, if the vessel has been twenty-four hours in possession of the enemy, and is re-captured by a privateer, she shall be condemned to the re-captors. By the 3d article, if the re-capture is made by a public ship, the property is to be restored, on payment of a thirtieth part for salvage, in case it has been twenty-fours in possession of the enemy; if longer, a tenth part.

The treaties between the United States and Prussia of 1785 and 1799, by which re-captures from a common enemy were regulated, have both expired.

The ancient law of Denmark condemned, after twenty-four hours' possession by the enemy, and restored, if the property had been a less time in his possession, upon payment of a moiety for salvage. But the ordinance of the 28th of March 1810, restored Danish or allied property, without regard to the length of time it might have been in the enemy's possession, upon payment of one-third for salvage.

By the ancient Swedish ordinances, and that of July 1788, it is provided, that the rates of salvage on Swedish property shall be one-half of the value, without regard to the length of time the property may have been in the enemy's possession. The treaty between the United States and Sweden, of 1783, which has expired, contained precisely the same stipulations on this subject as that with the Netherlands.

Although our salvage act may not, perhaps, extend to cases of re-capture from pirates, yet there can be little doubt, that the benefit of the same equitable rule of reciprocity, which is recognised by the statute, and is also a principle of public law, would be imparted to such cases. Thus, Valin is of the opinion, that the property of friendly nations, retaken from pirates, by French captors, ought not to be restored to them, upon payment of salvage, if the law of their *own country gives it wholly
*99] to the retakers, otherwise, there would be a defect of reciprocity, which would offend against that impartial justice which is due from one state to another.[1]

As a capture by pirates cannot divest the title of the original owner, by any length of possession, however great, it is obvious, that the former proprietor is entitled to restitution, in case of re-capture from them by friendly powers, upon the payment of a reasonable salvage. But certain nations have established a different rule, at least, as respects the property of their own subjects, and give the whole property re-captured from pirates to the retakers. Such was, or is, the usage of Holland, Spain and some of the Italian States. Grotius, *de Jure Belli ac Pacis*, lib. 3, ch. 9, § 17; De Habreu, part 2, ch. 6. But Grotius is of the opinion, that such a municipal regulation cannot prevent foreigners from reclaiming their property, upon payment of a reasonable salvage, because, by the universal law of nations, the property of the original owner is not divested on a capture by pirates. Ibid. And by the 9th article of the treaty of 1795 between the United States and Spain, the latter has dispensed with her peculiar law in this respect, both parties having stipulated to restore the property of either nation re-captured from pirates. In case of re-capture from pirates, the French law restores the property of subjects and allies (in which last term, neutrals are included), on payment of one-third for salvage.[2]

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[1] "Me feroit penser, que les alliés qui aux termes de notre article, ont droit de réclamer leur effets repris sur des pirates par des François, ne doivent s'entendre que de ceux qui suivent la même jurisprudence que nous; autrement, il n'y auroit pa de reciprocité: ce qui blesseroit l'egalité de justice, que les états se doivent les uns aux autres. Sur l'Ordonnance, liv. 3, tit. 9, art. 10; Traité des Prises, ch. 6, § 2, n. 8.

[2] "Les navires et effets de nos sujets ou alliés repris sur les pirates, et réclamés dans l'an

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A capture by a cruiser of the Barbary powers is not a *piratical seizure which will have the effect of invalidating the conversion of property under it. They were formerly considered as pirates, but have since acquired the rights of legation and of war, in form. Consequently, re-captures from them are to be judged by the same rule as those from any other public enemies. The Helena, 4 Rob. 8; Sir L. Jenkins's Works, Vol. II., p. 791; Bynk. Q. J. Pub., lib. 1, ch. 17; Emerigon, *Des Assurances*, tom. 1, p. 526.[1] But the law of nations, as received among the nations of Europe and the countries colonized by them, or that portion of the human race denominated Christendom, is not to be applied to them, to the Turks, and other Mohammedan people, with the same rigor, and in all the details, with which it is administered among that class of nations to which it is peculiarly applicable. The Helena, 4 Rob. 3; The Kinders Kinder, 2 Ibid. 88; The Hurtige Hane, 3 Ibid. 324; The Madonna del Burso, 4 Ibid. 169; Ward's History of the Law of Nations. The same formalities in proceeding to condemn captured property, are not required in order to divest the title of the original owner. It is sufficient, if the confiscation takes place in their way, and according to the established custom of that part of the world. The Helena, 4 Rob. 3. But they are held to be bound to an observance of the law of blockade, that being one of the most universal and simple operations of war; and if a European army or fleet is blockading a town or port, they are not at liberty to trade with it. The Hurtige Hane, 3 Rob. 324. And though, in prize causes, an indulgence is granted to the subjects of the Ottoman empire, which is not allowed to any foreigners of Christendom, in consideration of their peculiar situation and character, and of their not being professors of exactly the same law of nations, *with ourselves; yet in matters of contract between such persons, or between them and other foreigners, courts of justice have not thought themselves at [*101 liberty to act otherwise, than by the general rules applicable to all forensic business. The Jerusalem, 2 Gallis. 191–201.

The case of the rescue of captured vessels and cargoes from the enemy, by the insurrection of the persons on board, is not provided for by our salvage act, or the British statute. Nor is the case of rescue mentioned in the French and other continental ordinances. Restitution to the original owner, is, however, universally decreed, in such cases, without regard to the length of time the re-captured property may have been in the enemy's possession; and the rate of salvage is discretionary, and dependant upon the value of the services performed. The Two Friends, 1 Rob. 271; The Walker, Stew. 105; Valin, *Traité des Prises*, ch. 6, § 1, n. 18; Bonnemant's Translation of De Habreu, tom. 2, p. 84; Emerigon, *Des Assurances*, tom. 1, p. 505.

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et jour de la déclaration qui en aura été faite en l'amirauté, seront rendus aux propriétaires, en payant le tiers de la valeur du vaisseau, et des marchandises pour frais de recousse. Ordonnance de 1681, liv. 3, tit. 9, *Des Prises*, art. 10.

[1] Depuis long-temps, les mœurs antiques étoient disparues des Bords Africains. Les Barbaresques étoient devenus de vrais pirates. *Bugia, ed Algieri, infami, nidi di corsari*, dit le Tasse; Jérusalem délivrée, chant. 15, st. 21. Mais aujourdhui ils ne merite plus cette qualification, parce que dans leur guerre, ils se conforment à l'ancien droit des gens. Ce n'est que par représailles que leurs prisonniers deviennent esclaves parmi nous." Emerigon, loc. cit. tom. 1, p. 256.

LANUSSE *v.* BARKER.

Guarantee.—Interest.—Record.

B., a merchant in New York, wrote to L., a merchant in New Orleans, on the 9th of January 1806, mentioning that a ship belonging to T. & Son, of Portland, was ordered to New Orleans for freight, and requesting L. to procure a freight for her, and purchase and put on board of her five hundred bales of cotton, on the owner's account; "for the payment of all shipments on owners' account, thy bill on T. & Son, of Portland, or me, 60 days sight, shall meet due honor." On the 13th of February, B. again wrote to L., reiterating the former request, and inclosing a letter from T. & Son, to L., containing their instructions to L., with whom they afterwards continued to correspond, adding, "thy bills on me, for their account, *for cotton they
*102] order shipped by the Mac, shall meet with due honor." On the 24th of July 1806, B. again wrote L., on the same subject, saying, "the owners wish her loaded on their own account, for the payment of which, thy bills on me shall meet with due honor, at 60 days sight." L. proceeded to purchase and ship the cotton, and drew several bills on B., which were paid; he, afterwards, drew two bills on T. & Son, payable in New York, which were protested for non-payment, they having, in the meantime, failed; and about two years afterwards, drew bills on B., for the balance due, including the two protested bills, damages and interest: *Held*, that the letters of the 18th of February, and 24th of July, contained no revocation of the undertaking in the letter of the 9th of January; that although the bills on T. & Son were not drawn, according to B.'s assumption, this could only affect the right of L. to recover the damages paid by him, on the return of the bills, but that L. had still a right to recover on the original guarantee of the debt.

It was also *held*, that L., by making his election to draw upon T. & Son, in the first instance, did not, thereby, preclude himself from resorting to B., whose undertaking was, in effect, a promise to furnish the funds necessary to carry into execution the adventure. Also *held*, that L. had a right to recover from B., the commissions, disbursements and other charges of the transaction.

Where a general authority is given to draw bills from a certain place, on account of advances there made, the undertaking is to replace the money at that place; in this case, therefore, the legal interest at New Orleans was allowed.[1]

An agreement of the parties, entered on the transcript, stating the amount of damages to be adjudged to one of the parties, upon several alternatives (the verdict stating no alternative), not regarded by this court, as a part of the record brought up by the writ of error; but a *venire de novo* awarded, to have the damages assessed by a jury, in the court below.

Lanuse *v.* Barker, 10 Johns. 312, overruled.

ERROR to the Circuit Court for the district of New York. This was an action of *assumpsit*, brought in the circuit court of New York, by the plaintiff in error, against the defendant, to recover the amount of 500 bales
*103] of cotton, shipped by the plaintiff, from New *Orleans, on account of John Taber & Son, of Portland, in the district of Maine, upon the alleged promise of the defendant to pay for the same, with the incidental disbursements and expenses. At the trial, a verdict was taken, and judgment rendered thereon for the defendant, and the cause was brought up to this court by writ of error.

On the 19th of December 1805, the defendant, a merchant in New York, wrote a letter to the plaintiff, a merchant in New Orleans, containing, among other things, the following passage: "I am loading the ship Mac, for Jamaica; she belongs to my friends, John Taber & Son, Portland, who, I expect, will order her from thence to New Orleans, to thy address, for a freight, and in that case, if thee makes any shipments for my account, to the port where she may be bound, give her the preference of the freight." This letter was received by the plaintiff, on the 6th of February 1806.

[1] Boyle *v.* Zacharie, 6 Pet. 635; York *v.* Wistar, 16 Hax. Pa. Reg. 15. And see Scudder *v.* Union Bank, 91 U. S. 406.

On the 9th of January 1806, the defendant wrote to the plaintiff the following letter:

(Original per Mac.)

"New York, 1st month, 9th, 1806.

"Paul Lanusse, Esq.

"Esteemed Friend:—This will be handed you by Captain Robert Swaine, of the Portland ship Mac, which vessel is bound from this to Jamaica, and from thence to New Orleans, in pursuit of freight; she will be to thy address; she is a good ship, between three and four *years old, has [*104 an American register; is of an easy draft of water, although rather large; a freight for Liverpool will be preferred; if not to be had, for such other port as thee thinks proper, send her. If no freight offers for Europe, send her to this, or some neighboring port, with all the freight that can be had, which I have not any doubt will be sufficient to load her; if thee can get three-fourths as much for this port as for Europe, I should prefer it; if not, I should prefer a freight to Europe. Immediately after her arrival, I wish thee to commence loading her, on owner's account, who wish thee to ship five hundred bales, on their account, but do not wish to limit the quantity, a few bales more or less, according as freight offers; and for the payment of all shipments on owners' account, thy bills on them, John Taber & Son, Portland, or me, at 60 days sight, shall meet due honor; all shipments on owners' account, if the ship goes for Liverpool, address to Rathbone, Hughes & Duncan; if for London, Thomas Mullet & Co.; if Bordeaux, to John Lewis Brown & Co.; if Nantz or Cherbourg, Preble, Spear & Co.; if Antwerp, J. Ridgway, Merting & Co.; if Amsterdam, Daniel Cromelin & Sons. Captain Swaine will take a sufficiency of specie from Jamaica for ship's disbursements; please write me often, and keep me advised of the state of your market, &c. Of thy shipments by the Mac, on owners' account, let as much go on deck, as can be safely secured, and have her dispatched from your port as soon as possible. Thy esteemed friend,

JACOB BARKER."

*And on the 26th of January 1806, the defendant wrote the plaintiff as follows: "Since writing thee, under date of the 9th instant, I [*105 have engaged for the ship Mac, the freight of eight hundred bales of cotton, from New Orleans to Liverpool, agreeably to the enclosed copy of charter-party. I have, therefore, to request thy exertions in dispatching her for Liverpool, filling her up, either on freight, or owners' account, and particularly fill her deck and quarters on owners' account. Her owners wish large shipments of cotton made on their account, which, if bills can be negotiated on New York, I have informed them, thee would make: I, however, am clearly of opinion, that it will be more for their interest to have her filled up, on freight: on this subject, I shall write thee again more fully. Capt. Swaine will take with him, from Jamaica, eight thousand Spanish dollars, for my private account, which I wish invested in cotton." This letter was written on the same sheet of paper, and immediately following a duplicate of the preceding letter of the 9th of January, and was received by the plaintiff on the 18th of March, when he wrote an answer, saying, "On my part, nothing shall be wanting to satisfy the contracting parties, when the ship arrives, and your instructions shall be strictly observed, conforming my-

self to the latter you gave, and in case of necessity, I think, it will be easy to place bills."

On the 13th February, 1806, the defendant wrote to the plaintiff as follows: "Inclose, I hand thee a letter from the owners of ship Mac, to which
*106] I have only to add, that thy *bills on me for their account for the cotton they order, shipped by the Mac, shall meet due honor."

On the 29th of August 1806, the plaintiff wrote the defendant: "A few days ago, I was favored with a few lines from Messrs. John Taber & Son, importing that they wrote to you, to Captain Swaine, and me, such directions as you might think proper, but I have not as yet been favored with any of yours. The Mac remains precisely in the same situation: $4250 demurrage, have been paid on her account, and I only wait for further information from you, to act, in case demurrage is refused."

On the 24th of July 1806, the defendant wrote the plaintiff as follows: "Relative to the unfortunate situation of the Mac, I have to observe, that if she remains at your port, idle, Fontaine Maury, or his agent there, must pay the demurrage every day, or the master must protest, and end the charter; as long as the demurrage is paid, agreeable to charter-party, the ship must wait; as soon as that is not done, the captain or owners' agent can end the voyage, by protesting, and entitle the owners to recover their full freight: so that thee had better take the eight hundred bales, on account of Fontaine Maury, at a low rate, than to subject him to such a heavy loss: thee will, on receipt of this, be pleased to receive the demurrage daily, or end the charter, and dispatch her for Liverpool, on owners' account, taking all the freight that offers, and fill her up with as much cotton as possible (not less than five hundred bales), logwood and staves, as it will not answer
*107] to keep so valuable a ship there any longer, *without earning something for her owners. Although I say, fill her up with cotton, logwood and staves, on owners' account, thee will please understand, that I should prefer her being dispatched agreeable to charter-party; if that cannot be done, I prefer her taking freight for Liverpool, excepting about five hundred bales, the owners wish shipped on their account; yet rather than have her there, idle, the owners wish her loaded on their own account; for the payment of which, thy bills on me shall meet due honor, at 60 days sight, which I presume thee can easily negotiate."

On the 26th of September 1806, the plaintiff wrote the defendant: "Since my respectful last of 29th August, I am favored with your much esteemed of 24th July, the contents of which I have duly noticed. I have to inform you of the disaster which has befallen the Mac. On the night of the 16th and 17th inst., we experienced a most violent gale, which has done great injury to the shipping, and drove the Mac from her moorings, to a considerable distance from the town," &c. "Nor can I flatter you of procuring either freight for her, or accomplishing your order, before December," &c.

On the 6th of September 1806, the defendant wrote the plaintiff, as follows: "Since I last had this pleasure, ordering a protest against the charterers of the Mac, and that vessel dispatched on owners' account for Liverpool, with staves, logwood and cotton, I have not received any of thy
*108] acceptable communications. I now confirm *that order, and request, if a full cargo be not engaged for the Mac, on receipt of this, that

you ship two hundred bales of cotton, for my account, to the address of Martin, Hope & Thornley, and thy bills on me, at 60 days sight, shall meet due honor for the same. On receipt of this, lose no time in purchasing the two hundred bales, and what may be yet wanted for the ship on owners' account, as a very considerable rise has taken place in that article, at Liverpool; therefore, thee will not lose any time in making the purchase."

On the 10th of October 1806, the defendant wrote the plaintiff: "By thy letter of the 29th of August, to John Taber & Son, I observe, thee had an idea of sending the Mac here, if a freight did not soon offer, which I think thee would not (on reflection) do, if a freight from this port did not offer, as she had much better remain at New Orleans than be sent here in ballast. Therefore, request, if she is not dispatched agreeable to charter-party, that she remain at your port, until a freight can be obtained for her, with what thee can ship on owners' account. They wish at least five hundred bales of cotton. I hope thee did not ship logwood, as I find that article will not pay any freight; therefore, if thee has not made a shipment of that article, please omit it. Thee must, of course, keep the ship as long as demurrage is paid."

On the 26th of November 1806, the defendant wrote the plaintiff: *"I wish the Mac got off as soon as possible, and prepared for a voyage; when, I wish five hundred bales of cotton shipped, on [*109 account of her owners, for Liverpool, and the ship filled up with freight goods, even at a low rate: if freight should be scarce, and thee can purchase good flour, at about four and a half dollars per barrel, thee will please ship from five hundred to one thousand barrels, on account of the owners of the Mac, and on thy making any purchases for those objects, inform Rathbone, Hughes & Duncan, Liverpool, by letter, duplicate and triplicate, requesting them to have the full amount of thy shipment on owners' account insured, stating particularly when thee expects the ship to leave New Orleans, &c. If cotton falls to twenty cents, please ship five hundred bales of cotton for my account, by the Mac, consigned to Martin, Hope & Thornley, drawing on me at sixty days for the same. I do not wish a bale shipped, at a higher price than twenty cents, and I hope thee will engage the freight as low as 1½*d.* My only reason for ordering it in the Mac, is to assist her owners; therefore, if a full charter offers for her, or if anything should prevent her going, thee will ship five hundred bales by some other good vessel or vessels."

On the 25th of December 1806, the defendant wrote the plaintiff: "I am favored with thy letter of the 7th, by which I am pleased to observe the Mac was off, and likely to be dispatched for Liverpool. Her owners are desirous that she be dispatched for that place, without delay, as I mentioned to thee in my last letter on the *subject of the Mac's business. If thee has contracted for the cotton, or any part thereof, that I ordered, [*110 let all that has been contracted for be shipped, according to my last request, but do not purchase a bale, for my account, after this letter reaches thee, above sixteen cents, as that article has become very dull at Liverpool, and likely to be low, in consequence of the success of the French army on the continent. If thee can purchase at, or under, sixteen cents, before May, thee may purchase and ship such part of the five hundred bales as has not been purchased, before this letter reaches thee."

On the 22d of January 1807, the plaintiff wrote the defendant as follows: "I have now commenced the purchase of cotton for account of Messrs. John Taber & Son, and have paid hitherto twenty-two cents cash, at which price seventy-two bales were ready to be shipped, as I expect to find an opportunity of placing my bills upon you. I shall complete the purchase of 500 bales, which will be necessary, in order to get a full freight," &c. "I have now to inform you, that I have drawn on you, under date of the 15th of January, for $1800, say eighteen hundred dollars, payable sixty days after sight, to the order of Mr. A. Brasier, in Philadelphia, which draft goes on account of the 72 bales of cotton already purchased, and request you to honor the same."

And on the same day, he wrote the defendant: "The present merely serves to inform you, that I have this day valued upon you,

*111] *$1370 order Joseph Thebaud.
607 23 Declaire & Count.
1100 Stephen Zacharie.

$3077 23, sixty days after sight, and refer to my letter of this day."

On the 13th of February 1807, he wrote the defendant: "I have engaged 150 bales, for account of Messrs. John Taber & Son, at market price, which I expect in town in a few days, when I shall, without delay, ship the same on board the Mac, making the 220 bales in all. This commencement, I hope, will encourage shippers to give us some freight; at all events, I shall keep you duly advised of my proceedings. Under date of the 6th inst., I took the liberty of valuing upon you 301 dollars 22½ cents, sixty days after sight, to the order of Jacob D. Stagg; on the 12th inst., 573 dollars, to the order of Samuel Lord, and shall continue drawing as opportunity offers."

On the 16th of the same month, he wrote the defendant: "The present merely serves to inform you, that I have this day valued upon you 600 dollars, say, six hundred dollars, to the order of Benjamin Labarte, sixty days after sight, and request you to honor the same, and place to account of J. T. & S."

On the 20th of February 1807, the defendant wrote the plaintiff:

*112] *"I am in daily expectation of hearing of the Mac's progressing for Liverpool. Before this reaches thee, I hope she will have sailed; if not, please lose no time in dispatching her. That thee may be fully acquainted with her wishes of her owners, I annex a copy of the last letter I have received from them, and request thee to comply with their wishes in every particular."

The copy of the letter from John Taber & Son, referred to in this letter, is as follows:

"Portland, 2d mo. 9, 1807.

"Jacob Barker:

"By last mail, we received thy favor of the 2d inst. inclosing one from Captain Swaine to thee. We notice thy proposition for us to give liberty for the Mac to take freight for any port in Europe, but as we have got her and her freight insured in Liverpool, at and from New Orleans to that port, we wish to have her go there, even if we load on owners' account. We are well satisfied, that Lanusse hath not yet loaded her, as we have no doubt

cotton will be much lower in a short time. And as we apprehend that shippers of cotton will now turn their attention to other parts of Europe, we think the probability is, that cotton will be in demand in Liverpool, by the time the Mac will arrive there; we likewise think, it will answer to ship good flour, and probably some good staves can be purchased; we had rather have her loaded, on our own account, with those three articles, than to take freight for any other port, but we think, there can be no doubt, but that when she begins to load on owners' account, that some considerable *freight can be obtained. We really wish thee to write Lanusse to [*113
dispatch her, with liberty to take two thousand barrels of good fresh flour, if freight does not offer sufficient, with the five hundred bales of cotton before ordered, to load her without delay; as we have no doubt good flour will answer, and we cannot think of her being longer detained at New Orleans. We remain, thy assured friends,

(Signed) JOHN TABER & SON."

And on the 3d of March 1807, the plaintiff wrote the defendant: "The present merely serves to inform you, that I have this day valued upon you 10,000 dollars, say, ten thousand dollars, payable sixty days after sight, to the order of Mr. Thomas Elmes, and request you to honor the same, and place to account of J. T. & S."

On the 6th of March 1807, he again wrote the defendant: "I refer to my respectful last of 13th, 16th, 24th ult., and 3d inst., the contents of which I confirm. On the 16th, I valued upon you for 600 dollars, and on the 3d inst., for 10,000 dollars, making in all the sum of 16,351.3¾ cents, on account of the shipment *per* Mac, for account of Messrs. John Taber & Son. I have already bought 72 bales at 22 cents, 107 do. at 20¾ cents, 175 do. at 20½ cents, together 354 bales, and 30m. staves, amounting to about 22,000 dollars. There remains 146 bales more to be purchased, which I hope to get; the total amount, with charges and commission, *will be about 34,000 [*114
dollars—for which sum I shall order Messrs. Rathbone, Hughes & Duncan, to get insurance effected. I shall continue to draw on you as occasion presents."

On the 11th of March 1807, he wrote the defendant, informing him that he had drawn on the defendant to the order of Mr. F. Depau, for $6000, and to the order of Mr. J. P. Ponton, for $691.50.

On the 15th of April 1807, the defendant wrote the plaintiff: "I have this moment received the unpleasant information of the failure of John Taber & Son, therefore, beg the favor of thy taking every precaution to secure my claim on them; for the payment of the cotton thee has shipped for their account by the Mac. If that ship has not got clear of your river, take up the bills of lading and fill up new bills, consigning the cotton to my order, forwarding me several of the bills, and instruct Captain Swaine to hold the cotton, until he hears from me; and if part of the old set have gone on, let them go, but take a new set, and make all the freight-money payable to my order, and if she has got clear of the river, make an arrangement with the shippers of the cotton to pay thee the freight-money, and give them a receipt for it, forwarding that receipt to Liverpool, but for the consignee to keep as a secret, that the freight-money has been paid, until they get all the freight goods."

And on the 16th of April 1807, the defendant again wrote the plaintiff: *115] *"I have taken the best counsel, and find the goods per ship Mac can be stopped for thy account *in transitu*, and have, therefore, taken all the steps in my power to have that object effected; and shall succeed so far as to keep the property at thy disposal, until thy power reaches Martin, Hope & Thornley, which will enable them to hold the property for thy use; therefore, send the power by the packet, and send duplicates and triplicates by other vessels, and several copies by mail and packet to me, to be forwarded; also draw on Rathbone, Hughes & Duncan, for the whole amount of shipment, ordering Martin, Hope and Thornley to pay them 1000 pounds of the amount drawn for, if they accept the bills. Confirm what I have written, copies of which I inclose for thy government. Thy bills on me will all be protested for non-payment, that thee can say, thee has not received pay for the cotton, but shall endeavor to furnish money, that will prevent disappointment to the holders. This, my counsel tells me, is indispensable, to enable thee to benefit by *transitu*, which cannot be done by any other person, nor by thee, after thee gets pay for the goods shipped."

And on the same day, the defendant wrote to Martin, Hope & Thornley, of Liverpool, as follows: "I inclose a letter written as agent and friend of Paul Lanusse, to Rathbone, Hughes & Duncan, which you will have the goodness to hand them, and make a memorandum of the delivery, and endeavor to make the contract for Lanusse as therein mentioned, and I will indemnify you from all loss in so doing; if you cannot make an absolute *116] agreement *with R. H. & D., to receive all the property Lanusse has or may ship by the Mac, for account of Taber & Son, to be applied for the payment of the bills Lanusse has or may draw on them, excepting one thousand pounds, and the profits on the adventure, which they may place to the credit of Taber & Son, if they are so much indebted to R., H. & D.; if not so much, then such sum as may be due them. You will cause insurance on the cargo of ship Mac, to the amount of nine thousand pounds sterling, and proceed, as the agent of Lanusse, to get hold of the property; you certainly can stop it *in transitu*."

On the same day, the defendant also wrote to Rathbone, Hughes & Duncan: "As the agent of my friend Paul Lanusse, at New Orleans, I have, in consequence of the failure of John Taber & Son, to inform you, that the goods he is shipping on board the Mac, Captain Swaine, have not in any part been paid for, therefore, they are to be stopped *in transitu*, for the benefit of my said friend Paul Lanusse, who is by me represented; and as his agent, I charge you, on your peril, not to accept, or in any manner commit yourselves for said Taber & Son, on account of said shipment, but if you are willing to receive said consignment, sell the same, and apply the whole proceeds to the payment of such drafts as Lanusse may draw on you, which shall not exceed the amount of invoice."

On the 30th of April 1807, the defendant wrote the plaintiff: "I annex copy of my last respects, and have to request, in the most pointed manner, *117] thy particular attention *to my request therein. I have sent out many letters, in hopes of meeting the Mac; if any of them meet her in the Mississippi, Captain Swaine will return to New Orleans, with all his papers, for thee to alter the direction of the goods shipped by that vessel for account of Taber & Son; if not so successful as to meet her, but if any of them

meet her, after she leaves the Mississippi, she will stop at this port, when I will make the necessary alterations; but if none of my letters meet her, my only chance for securing myself is, by thy stopping the property *in transitu*. To have that done, thee must immediately send out powers to Liverpool, therefore, I beg thee to confirm all I have written to Martin, Hope & Thornley."

On the 20th of May 1807, the plaintiff wrote to the defendant: "Your esteemed favor of the 15th ultimo has just reached me, and with much regret do I learn the failure of Messrs. John Taber & Son. I hope that you will not be a sufferer, and that you have taken timely precaution. Agreeably to your request, I have written on to Liverpool, but am afraid my letters will come too late, as the Mac sailed from the Balize, on the 23d of April, and as she is a good sailer, will, no doubt, have discharged her cargo, before the receipt of my letter. For your government, I inclose you invoice and bill of lading of the 500 bales cotton shipped per Mac; also, my account current with Messrs. John Taber & Son, according to which a balance of $1251.28½, for which amount I shall value upon you as occasion offers. You will, I hope, have taken the necessary measures to meet my drafts dated March *20th, drawn direct on Messrs. Taber & Son, in Portland, payable in New York, of which I advised you. I am anxious to receive [*118 your further communications, and most sincerely hope that you have been able to cover your claim, and not be a loser by this unfortunate accident."

And the 9th of June 1807, he wrote the defendant: "I have only time to inform you of the receipt of your favor of 16th and 30th April, and to assure you that I shall punctually follow your instructions, and lose no time in forwarding to you, and to Liverpool, all necessary papers, relying on your integrity and honor. I feel no uneasiness respecting my concern in this unfortunate business; at the same time, I most sincerely regret that you should be a sufferer, but hope things may yet result favorable."

On the 28th of August 1807, the plaintiff wrote the defendant: "The last mail brought me the non-acceptance, protest, &c., of the two bills of exchange drawn by me on the house of John Taber and Son, under date of the 20th of March 1807, in favor of Thomas Elmes, and indorsed by him to Messrs. Corp, Ellis & Shaw, each for $5000, making the sum of $10,000, and which I have been obliged to here to pay Mr. Elmes, together with ten per cent. damages, amounting to the further sum of $1000, giving a total of $11,000. It is unnecessary for me to dwell upon the serious inconveniences which have resulted from this circumstance, or to repeat how prejudicial the whole of the transaction with the house of John Taber & Son* [*119 has been to my affairs. I, however, rely upon you for the payment of this money, as it was entirely upon your recommendation, on the strength of your assurances, and the respectability of your guaranty, that I was induced to embark in this business, and to procure cotton for the cargo of the ship Mac; but this subject has already been sufficiently enlarged upon, in my former letters to you, and I sanguinely trust, that you will not delay making the necessary arrangements for this reimbursement. No information has as yet been received by me from Liverpool, respecting the fate of the 500 bales of cotton shipped on board the Mac. I feel anxious to know the success of the steps which have been taken in that

quarter. I trust that you will communicate to me the earliest information that you may receive on this subject."

On the 30th of January 1806, John Taber and Son wrote to the plaintiff as follows: "We wrote thee, the 24th inst., since which, we have received a letter from Jacob Barker, informing that he had engaged eight hundred bales of cotton for the Mac, previous to her sailing from New York, from your port to Liverpool, which has fixed her route; as she hath so much freight engaged, we flatter ourselves that she will be filled up immediately. It is our wish to have two hundred bales of good cotton shipped on owners' account, and as much more as may be necessary to make dispatch, as we are not willing to have her detained in your port for freight. To reimburse thyself for the cotton purchased on owners' account, thou may draw bills, at sixty days sight, either on Jacob Barker, or on us. If thou *can sell bills on Rathbone, Hughes & Duncan, merchants, at Liverpool, at par, thou may, on them, taking care not to send the bills before she sails, and to write on timely to them to get insurance made on the amount of property shipped on our account."

*120]

On the 27th of March 1806, the plaintiff wrote J. Taber & Son: "Your much respectful favor of the 30th of January last, came duly to hand. I observe what you say respecting the purchase of cotton for your account to go by ship Mac, of which our friend Jacob Barker, likewise makes mention; this ship has not yet made her appearance, but as soon as she does, you may depend on my utmost exertions to follow your orders, and give the ship all dispatch that lays in my power. The mode of reimbursements for purchases made here, will be by drawing on our friend Barker, agreeable to his advice, as I think it will be less difficult for me to place bills on New York. Cotton is rising, and fetches now 26 cents. Notwithstanding, I shall follow your orders with respect to the Mac, unless anything to the contrary should reach me, before she arrives. As for drawing on Liverpool, it is altogether out of my power, for such bills are seldom asked for here. I shall advise Messrs. Rathbone, Hughes & Duncan, in due time, to effect insurance on the property I may ship on your account. Awaiting the pleasure of announcing you the Mac's arrival, I continue with respect," &c.

On the 5th of June 1806, the plaintiff wrote J. Taber & Son: "Cotton is pretty steady at 22 cents. Should circumstances authorize my purchasing for *your account, I shall, in preference, value for the amount on Mr. Jacob Barker."

*121]

On the 29th of June 1806, John Taber & Son wrote to the plaintiff: "We have not been favored with any of thy communications, since 4th month, 7th. We have been daily expecting to hear of our ship Mac being laden and ready for sea, as we had not the least idea but that the eight hundred bales that Jacob Barker contracted for, would be ready at the time agreed on, and expected thou would have purchased a sufficiency to fill up, on owners' account, provided freight did not offer in season. By last mail, we received a letter from Jacob Barker, informing that he feared the contractors would not furnish the eight hundred bales, and that in consequence thereof the Mac would be detained, until further orders from us. We, therefore, have this day wrote Barker, to give thee and Captain Swaine such directions as he may think proper. But we hope she will be dispatched for Liverpool, before this reaches thee, as it is our wish to have her go there."

On the 15th of July 1806, John Taber & Son wrote the plaintiff: "Thy favor of the 5th ultimo, by mail, was this day received, the contents noticed, we are very sorry to find that the Mac is so detained with you, we having flattered ourselves that she would have been at Liverpool by this. We wrote thee, 27th ultimo, by mail, directing thee to follow Jacob Barker's instructions respecting the Mac, which we now confirm, and *say that we wish the to follow his instructions at all times, the same as from us." [*122

On the 29th of August, the plaintiff wrote J. Taber & Son: "Your esteemed favor of the 29th of June has duly come to hand, but I have in vain expected further directions from Mr. Barker, for the want of which I have experienced many difficulties."

On the 25th of July 1806, J. Taber & Son again wrote the plaintiff: "Thy favor of the 13th ultimo was this day handed us by Captain Webb, of the Phœnix. It had been broken open at sea, by an English cruiser. We have not received a copy of thy protest; we should like to see it. We are extremely sorry, that we had not, in the first instance, given thee orders to have laden our ship with staves, logwood and cotton, on our account, with what freight could be obtained; we should certainly have done it, if we had the least idea that we should have been disappointed of the eight hundred bales. We have this day received letters from Jacob Barker, informing he had given thee directions to load immediately as above; hope thou can make it convenient to put a large share of cotton on board, on our account, as we think that article will pay much more than staves; we trust thou will send to Jacob Barker such documents as will enable him to recover the freight and demurrage."

And on the 30th July 1806, Taber & Son wrote the plaintiff: "We hope that the Mac will sail for Liverpool before *this reaches thee, with a cargo on owners' account, and a large proportion of cotton." [*123

On the 16th of September 1806, the plaintiff wrote J. Taber & Son: "I am successively favored with your much esteemed of 15th, 25th and 30th of July, and have taken due notice of their contents. Mr. Jacob Barker has likewise wrote me, and shall follow his instructions as far as lays in my power."

On the 3d of October 1806, Taber & Son wrote the plaintiff: "We observe that thou had thoughts of sending the Mac to New York, after a few weeks, if thou did not receive further instructions: but we trust that will not be the case, as we presume that thou received Jacob Barker's orders soon after, to load her on owners' account for Liverpool, except the demurrage was continued to be paid. If so, we are willing to let her lay, until the charterers procure the 800 bales freight. When that is the case, we presume thou will not let her be detained for the remainder part of the cargo, to the charterer's damage. We renew our request for thee to continue to follow Jacob Barker's instructions, from time to time, respecting the Mac, the same as from us. We are well satisfied with thy proceedings."

On the 12th of December 1806, the plaintiff wrote J. Taber & Son, acknowledging the receipt of their letter of the 3d of October, and saying, "I have not, as yet, commenced the purchase of cotton, only small parcels have as yet come to hand; as soon as I can *succeed, I shall value upon Jacob Barker for the amount," &c. [*124

On the 9th of November 1806, J. Taber & Son wrote the plaintiff: "We do not pretend to give thee any positive order respecting the Mac, as we have heretofore directed thee to follow Jacob Barker's directions; but we will give thee a sketch of our wishes, viz: To have the Mac dispatched to Liverpool, as soon as possible, with about five hundred bales of cotton, on owners' account, and the remainder of her cargo on freight," &c.

On the 22d January 1807, the plaintiff wrote J. Taber & Son: "I have written this day to Mr. Barker, and keep him advised of the state of affairs here. Upon his remarks on the subject of demurrage, I have unconditionally passed to your account, the total sum paid in, and shall employ the funds for the expenses of the ship, and the surplus for the purchases of cotton for your account. I am happy to inform you, that I have already made a commencement, and purchased 72 bales at 22 cents, which are now ready to be shipped on board the Mac. I shall, as opportunity offers, draw upon Mr. J. Barker for the amount, and complete the 500 bales, to be shipped for your account, which will be absolutely necessary to procure a full freight. I valued upon Mr. J. Barker, $1800, which sum is passed to your credit. I need not recommend to you to take the necessary measures, in order to have my drafts duly honored by that gentleman."

*125] *On the 13th of February, the plaintiff wrote J. Taber & Son, and after mentioning a further purchase of cotton for their account, he states: "I add you a note of my drafts upon Mr. J. Barker, on account of this shipment, for your account, and shall keep you constantly advised of my proceedings."

On the 9th of February 1807, Taber & Son wrote the plaintiff: "We having, by last mail, received account, that the Mac had not begun to take in her cargo on New Year's day; we are well satisfied, that thou had not purchased cotton for us at the high price that we understood it was selling at, as we presume it will be much lower, by the time this reaches thee. If the Mac hath not taken in any of her cargo, before this reaches thee, we wish thee to commence loading her on owners' account, immediately; as we have ever found, that when our ship commenced loading on owners' account, that freight soon offered. Jacob Barker informed us, some time past, that he had given thee directions to ship five hundred bales of cotton, on our account, and liberty to ship some flour, which we think may answer well, provided it is good. If freight cannot be obtained, to fill her up with the flour and cotton that Barker hath ordered, we should like to have her filled up with good staves or timber, the growth of your country; but no log-wood or mahogany. We much wish to have the Mac dispatched for Liverpool as soon as may be."

On the 6th of March 1807, the plaintiff wrote J. Taber & Son: "On

*126] the 13th ultimo, I last had the pleasure of *addressing you. I have since procured a full freight for the Mac, at three cents per pound cotton, and she will be dispatched, in all this month, for Liverpool. I shall ship on board for your account, five hundred bales cotton and thirty thousand staves, of which you may now get insurance effected, the amount per invoice will be about $3400.

I have, since my last, valued upon Mr. J. Barker, for $600 and $10,000 on account of these purchases, and shall continue to draw as occasion offers.

As soon as the entire purchase is completed, I shall hand you the invoice and account-current, and shall acquaint Messrs. Rathbone, Hughes & Duncan with my proceeding respecting the above order for insurance, and shall have early opportunities of giving them timely information. I have communicated to Mr. Jacob Barker the present state of affairs."

And on the 20th of March 1807, the plaintiff wrote to J. Taber & Son: "The present merely serves to inform you, that I have this day valued upon you, payable in New York, the sum of $10,000, in two bills of $5000 each, say, ten thousand dollars, sixty days after sight, to the order of Thomas Elmes, Esq., which drafts go on account of cotton purchased for your account, and shipped on board the ship Mac. It is upon the particular respect of Mr. Elmes, that I have altered the mode of my drawing direct on Mr. Jacob Barker."

On the 17th of April 1807, the plaintiff again wrote J. Taber & Son: "I have now the pleasure of informing you, that *the Mac has sailed for Liverpool, having on board 500 bales of cotton for your own [*127 account, and 549 bales on freight. Inclosed, I hand you invoice and bill of lading of the former, amounting to $33,098.31, for which you will please credit my account. I have engaged 30m. staves, but they were of inferior quality, and I preferred not shipping them. With my next, I shall hand you account-current, &c. Capt. Swaine has taken along with him all the necessary documents to recover from the underwriters on the ship Mac; the amount of expenses incurred since the gale, until she was afloat, were $3042.25."

On the 24th of April, 1807, the plaintiff wrote to J. Taber & Son: "I refer to my respectful last of the 17th instant, and have now the pleasure of handing you account-current to this day, and other papers respecting our transactions, agreeable to which, there is yet a balance due me, of $1276.51½ cents, for which amount I shall value upon you, as occasion may offer."

Besides the above correspondence, the plaintiff produced in evidence an answer of the defendant to a bill of discovery, filed by the plaintiff in a suit formerly depending in the supreme court of the state of New York, which was commenced in April 1810, and discontinued in October 1813; of which answer the following is an extract:

And this defendant, further answering, says, that previous to the month of May 1807, he had large commercial dealings with the house or firm of John Taber & Son, of Portland, in the state of Massachusetts. *And that the said firm or house of John Taber & Son, having failed, prior [*128 to the said month of May 1807, and at the time of such failure, largely indebted to this defendant; and this said defendant visited Portland for the purpose of securing his demand against said firm or house of John Taber & Son; and soon after his return, he, about the first of May 1807, in conversation with Gabriel S. Shaw, of the firm of Corp, Ellis & Shaw, merchants, residing in this city, about the charter of a ship, mentioned to said Shaw, that he, Barker, had just returned from Portland, where he had been for the purpose of getting security from John Taber & Son, when he, said Shaw, informed him that they had, a few days previously, sent bills drawn at New Orleans, on said Taber & Son, under cover to the said Tabers, for acceptance, to the amount of $10,000; and inquired if he, this defendant,

supposed they would, in the deranged state of their business, return them regularly protested or accepted? From this defendant's knowledge of said Taber's business, he believed that those bills were drawn in payment for the ship Mac's cargo; this being the only information this defendant had of any bills being drawn at New Orleans, on said John Taber & Son, he was induced to accompany the said Gabriel Shaw to his office, to ascertain the particulars; who, at the instance of this defendant, exhibited to him either a letter, or one of the same sets of bills, by which this defendant learnt, they were drawn by Paul Lanusse, at New Orleans, on John Taber & Son, Portland, in part payment for the cargo of the Mac. That this defendant, acting
*129] *from the information so received, and from no other information or advice whatever, and also, from an apprehension that the said complainant, when he should hear of the failure of the said house of John Taber & Son, would claim from this defendant the amount for which the said bill or bills were drawn, and thereby expose this defendant to an expensive course of litigation, in resisting the said claim, if any should be made, he this defendant, wrote to the said John Taber & Son a letter on the subject of the said bill or bills, and which letter, he believes, is as follows, to wit:

"New York, 5 mo. 5th, 1807.

"John Taber & Son:—I am this day advised of Paul Lanusse's having drawn on you to the amount of $10,000, which bills were forwarded to you for acceptance; for the payment of those drafts, I am not liable, as I only promised to accept, in case of his drawing on me. You, undoubtedly, accepted those bills; if not, and you have them, be pleased, at all events, to accept them, as, if they are returned without acceptance, the charge will be, as at first, for the shipment, for which Lanusse may possibly think me answerable, but if the bills are accepted, he can only look to you. The debt, as to him, thereby becomes of another nature, but as to you, it is the same thing, and cannot place you in any worse situation. Therefore, let them be accepted, and if you have returned them without acceptance, authorize me to accept them, as your agent to this business; give immediate attention,
*130] *as I must not be made answerable for them; although injured, I am yet your friend,

JACOB BARKER."

And that, afterwards, this defendant wrote another letter to the said John Taber & Son, which he believes is as follows:

"New York, 5 mo. 15, 1807.

"John Taber:—This day's mail brought me thy letter, by which I am surprised to observe thee has refused compliance with my request. I cannot account for the strange advice your merchants gave respecting protesting those bills. I, however, admit, that in ordinary cases, there would not be much impropriety in protesting them, though I could not possibly alter the state of your business, the debt being indisputable, their being accepted only acknowledged the debt to be due; but I must insist, if thee has any regard to justice, that thee will, if not returned, accept them for account of John Taber & Son; if returned, authorize me to accept them for their account. I consider the argument, that I expected to secure the Mac and cargo, no excuse at all, particularly, as no attachment can be made in this

state for partial benefit, all attachments must be made for the benefit of all the creditors. So that, if I have property in my hands, the best possible step the creditors could take would be, for one of them to attach it in my hands; therefore, must pointedly insist on thy accepting, or ordering *me to accept those bills. As to advice from thy neighbors, it is [*131 one of those simple cases that do not require advice, and I say, expressly, when thee considers my situation, thee cannot honestly refuse my request. If I was in thy situation, and all the world advised me not to do it, I should not pay the least respect to such advice, but accept the bills, without a moment's hesitation. If thou thinks Paul Lanusse will be a more difficult creditor than I shall be, thee will, under present circumstances, be mistaken, to where I am thus forced into a monstrous loss, I shall be very difficult, although, in common cases, should be favorably disposed. Your friend,

JACOB BARKER."

The plaintiff further proved by Joseph Thebaud, of New York, the plaintiff's agent, that in the beginning of October 1807, he received from the plaintiff the following account, dated 1st September 1807, at New Orleans, which he showed to the defendant, and demanded payment of the same, which was refused by the defendant:

*Dr. Mr. Jacob Barker, of New York, for account of Messrs. John Taber & Son, of Portland, in acct. current with Paul Lanusse. . Cr. [*132

1807.			1807.			
April 13.	To amount of 500 bales of cotton, as per invoice.	$33,098 31	Jan. 23.	By my draft fav. Brasier,		$1,800 00
24.	Disbursements of ship Mac, as per account....	5,943 69		do.	Stephen Zacharie,	1,100 00
	My commissions on freight procured for the Mac, $5974.60 a 5 per cent.....	298 73		do.	Delarie & Canut,	607 25
	Do. on demurrage collected, $5150 a 2½ per cent.....	128 75		do.	Jos. Thebaud,	1,370 00
	My draft of March 20, on John Taber & Son, favor of Tho. Elmes....$5000 00		Feb. 6.	do.	J. D. Stagg,	301 00
	Do 5000 00		12.	do.	Samuel Lord,	573 00
	Damages paid, 10 per cent.....1000 00		16.	do.	B. Labarte,	600 00
		11,000 00	Mar. 8.	do.	Thomas Elmes,	5,000 00
		$50,469 48		do.	do.	5,000 00
	To balance per cont.....	$12,251 28	10.	do.	Francis Depau,	6,000 00
	Errors excepted.			do.	J. Paul Poutz,	691 60
			20.	do.	Thomas Elmes,	5,000 00
				do.	do.	5,000 00
				Demurrage ship Mac, commencing 5th June, to the 16th Sept., being 103 days, at $50 per day.		5,150 00
			May 2.	1 junk cable from ship Mac.....		25 24
				Balance due Paul Lanusse,.....		12,251 28
						$50,469 48

New Orleans, 1st September 1807.

(Signed) PAUL LANUSSE.

The plaintiff further proved, that in the suit first above mentioned, which had been depending between him and the defendant, in the supreme court of the state of New York, the plaintiff suffered a nonsuit, on the 19th of December 1808, after the judge had charged the jury in favor of the defen-

dant. And the plaintiff further proved, that he did, on the 30th of January 1809, draw two new sets of bills upon the defendant, which were produced and read in evidence by the plaintiff's counsel, and are in the words and figures following:

*New Orleans, 30th January 1809.

*133] Exchange, for dolls. 10,055.35 cents.

Sixty days after sight of this my second of exchange (first and third of same tenor and date not paid), pay to Mr. Jos. Thebaud, or order, ten thousand and fifty-five dollars, thirty-five cents, value received, which place to account of

PAUL LANUSSE.

To Mr. Jacob Barker, merchant, New York.

New Orleans, 30th January 1809.

Exchange, for dolls. 2195.93½ cents.

Sixty days after sight of this my second of exchange (first and third of same tenor and date not paid), pay to Mr. Jos. Thebaud, or order, two thousand one hundred and ninety-five dollars, ninety-three and a half cents, value received, which place to account of

PAUL LANUSSE.

To Mr. Jacob Barker, merchant, New York.

That the said bills were protested for non-acceptance on the 11th of March 1809, and for non-payment on the 13th May 1809. The notary also proved, that at the time of presenting the said bills, he offered to the defendant the account and letters herein next stated, which the defendant refused to accept, and desired the notary to take them away, who refused, and threw them on his, the defendant's, counter. The bills were accompanied with a letter of advice, mentioning that the first bill was for the balance due for the purchase of the 500 bales of cotton, and the other for disbursements

*134] of the ship *Mac, and $1500 damages paid on the two drafts of $5000 each on Taber & Son, returned protested for non-payment.

The plaintiff further proved, that all the bills of exchange, drawn by plaintiff on the defendant, and contained in the above account, amounting to $23,042.96, had been paid by the defendant after the same had been protested for non-payment, excepting the last-mentioned bills for $5000 each, drawn in favor of Thomas Elmes, and forwarded as aforesaid to Corp, Ellis & Shaw. It was also admitted, that the plaintiff had received no part of the freight of the Mac's cargo, although it is mentioned in a letter of his, that he had received the freight or a part of it. The plaintiff then proved, that the ordinary interest of money in New Orleans was ten per cent. per annum, and the lawful interest in New York was seven per cent.

The plaintiff, having made the proofs on his part, here rested his cause. Wherenpon, the defendant then produced in evidence the following account, forwarded to him by the plaintiff, in his letter of the 20th of May 1807.

Lanusse v. Barker.

Dr. Messrs. J. Taber & Son, in Portland, in account current with Paul Lanusse. Cr.

1807.			1807.		
April 13. To amount of 500 bales of cotton as per invoice		$33,098 81	Jan. 22. By my draft fav. Frasier,		$1,800 00
24. Disbursement of ship Mac, as per account....		5,943 69½	do. Stephen Zacharie,		1,100 00
My commission on freight procured for the Mac, $5974.50 *a* 5 per cent..		298 73	do. Delaire & Canut,		607 25
Do. on demurrage collected $5150 *a* 2½ per cent..		128 75	do. Joseph Thebaud,		1,370 00
			Feb. 6. do. Jacob D. Stagg,		301 21
			12. do. Samuel Lord,		573 00
			16. do. Labarte,		600 00
			Mar. 3. do. Thomas Elmes,		5,000 00
			do. do.		5,000 00
			do. Francis Depau,		6,000 00
			do. J. Paul Poutz,		691 50
			20. do. Thomas Elmes,		5,000 00
			do. do.		5,000 00
			Demurrage of ship Mac, commencing 5th of June, to 16th Sept., being 103 days *a* $50..		5,150 00
			April 24. Balance due me.....		1,276 52½
		$39,469 48½			$39,469 48½
April 24. To balance per contra due me.....		$1,276 42½			

Errors and omissions excepted.

New Orleans, April 24, 1807.
(Signed) PAUL LANUSSE.

Dr. Messrs. J. Taber & Son, of Portland, in account with Paul Lanusse. Cr.

1807.			1807.		
April 24. To balance per contra.		$1,276 52½	May 2. By 1 junk cable.....		$25 24
			20. balance.....		1,251 28½
		1,276 52½			1,276 52½
1807.					
May 20. To balance due me....		$1,251 28½			

E. & O. E.

New Orleans, May 20th, 1807. (Signed) For Paul Lanusse, P. & H. AMELUNG.

The defendant then proved, by Gabriel Shaw, of the house of Corp, Ellis & Shaw, of New York, that the two bills of exchange, drawn by Paul Lanusse on John Taber & Son, dated the 20th of March 1807, were received by Corp, Ellis & Shaw, from Thomas Elmes, of New Orleans, in whose favor they were drawn, about the 27th or 28th day of April, in the same year, and were immediately forwarded by him to John Taber & Son, of Portland, *for acceptance; that they were protested on the 30th of the same month, at Portland, for non-acceptance, and were received [*136 by the witness, with the protests, about the 5th or 6th of May, about which day, and after the receipt of the said bills, he either met the defendant in the street, or called at his house, but which he cannot recollect, and showed him, he believed, the said bills and protest, having understood the said defendant had, in some way, some concern in the business. That the said

bills, at maturity, were protested, in New York, for non-payment, and were afterwards remitted to the said Thomas Elmes, at New Orleans. From the protest, it appeared, that the two bills of $5000 each, were protested for non-payment, on the 2d day of July 1807, in New York, and that the limited time mentioned in the said bills, with the days of grace, were then expired, since the bills were protested for non-acceptance in Portland.

The defendant then rested his cause; upon which the plaintiff claimed a verdict for the sum of $17,908.02, if the court and jury were of opinion, that interest was allowable at the rate of ten per cent.; but if they were of opinion, that interest at the rate of seven per cent. only was allowable, then the plaintiff claimed a verdict for the sum of $15,910.94; and the plaintiff exhibited the following statement, showing the manner in which the said several sums were calculated, viz:

1st.	1807.		
April 13.	To amount of 500 bales of cotton, as per invoice		$33,098 31
24.	To disbursements for ship, with commissions at 5 per cent		5,943 60
	To commissions on freight, $5974.60, at 5 per cent		298 73
	To do on demurrage collected, $5150, at 2½ per cent		128 75
			$39,469 39
	*Cr.		
*137]	By bills paid	$23,042 96	
	By demurrage received	5,150 00	
	By one junk cable	25 24	
			28,218 20
			$11,251 19
	To interest on $11,251.19, from 13th of May 1809 (protest of new bills), to 13th of April 1815 (day of verdict) at 10 per cent.—5 years, 11 months.		6,656 83
			$17,908 02
2d.	To amount of damages as above	$11,251 10	
	To interest on the above sum of $11,251.19, for the same period at 7 per cent	4,659 75	
		$15,910 94	

The plaintiff then prayed the judge of the circuit court to charge and deliver his opinion to the jury, that the plaintiff was entitled to the aforesaid sum of $17,908.02, if the interest was to be calculated at the rate of ten per cent., or to the sum of $15,910.94, if the interest was to be calculated at the rate of seven per cent. The defendant insisted, that the plaintiff was not entitled to any damages; and the judge so charged the jury, *pro formâ*. A verdict was thereupon taken for the defendant, and a bill of exceptions tendered. An agreement was entered into by the counsel for both parties, that the cause should be carried to the supreme court by writ of error, and that if the supreme court should be of opinion, that the plaintiff was entitled to a judgment for the principal sum of $11,251.19 with interest at the rate of ten per cent., then the judgment should be rendered for the sum of $17,908.02, with costs. Or if the court should be of opinion, that he was entitled to interest at the rate of seven per cent. only, that *judgment
*138] should be rendered for the sum of $15,910.94, with costs: or if the court should be of opinion, that any other sum, different from either of the

above sums, is recoverable by the plaintiff, that judgment should be rendered for such other sum as the court might direct. But if it should be of opinion, that the plaintiff is not entitled to recover any damages, then the judgment for the defendant should be affirmed.

February 9th. *Pendleton*, for the plaintiff, argued, that the defendant was liable, both for the bills drawn by the plaintiff on Taber & Son, and also for the bills drawn in January 1809, on the defendant. That the original undertaking of the defendant was a guarantee that all bills drawn by the plaintiff, on account of the ship Mac, should be paid, whether drawn on the defendant, or on Taber & Son. The learned counsel entered into a critical analysis of the opinion of the supreme court of the state of New York in this cause (10 Johns. 325), and contended, that the rules for construing contracts extend to all parties alike, whether sureties or principals: that they must be construed according to the intention of the parties, not according to the mere literal meaning of the words. If these are ambiguous, the intention must be ascertained by the context, by contemporaneous declarations, writings and transactions, and above all, by the purposes and objects to be answered. The principle is applicable to the undertaking of a surety. *Barclay* v. *Lucas*, 1 T. R. 291, note. It is by no means a well-established rule, that the *contract of a surety is to be construed more favorably than that of the principal. *Mason* v. *Pritchard*, 12 East [*139 227. The law knows no favorites. The obligation of the surety is the inducement for the creditor to trust the principal, with whose affairs and circumstances the surety is presumed to be best acquainted. Formerly, nothing could discharge this liability, at law, but performance. If the creditor had discharged the principal, or extended the time of payment, by a new contract with the principal, without the surety's consent, the surety had no remedy. In latter times, the courts of law have interposed to protect the surety; but there is much contrariety in the numerous cases that have been decided, upon the question what transactions between the creditor and the principal shall discharge the surety. There is no doubt, that an absolute discharge of the principal, will discharge the surety also. But it is contended, that no new contract or transaction between the creditor and principal, shall discharge the surety, unless it deprive him of the right he always possesses of placing himself in the creditor's situation, by paying the debt according to the original contract, and thus getting into his own hands the means of securing himself. This principle is founded on the nature of the contract of suretyship, and is supported by the authorities, except one or two cases, which it will be found difficult to reconcile with the principle. *Bishop* v. *Church*, 2 Ves. 371; *Woffington* v. *Sparks*, Ibid. 569. All the cases decided in England in favor of sureties have been, where the creditor has taken away this right, by discharging the principal, or by *giving him a new extended credit. *Nesbitt* v. *Smith*, 2 Bro. C. C. 579; *Rees* v. *Bar-* [*140 *rington*, 2 Ves. jr. 540; *Smith* v. *Lewis*, 3 Bro. C. C. 1; *Phillips* v. *Astling*, 2 Taunt. 206; *Deming* v. *Norton*, Kirby 397. Mere delay and want of notice have been uniformly held insufficient to discharge a surety. *Cartlitch* v. *Eyles*, 2 Com. 558; *Peel* v. *Tatlock*, 1 Bos. & Pul. 419; *Trent Navigation Co.* v. *Harley*, 10 East 34; *Warrington* v. *Turbor*, 8 Ibid. 242; *O'Kelly* v. *Sparks*, 10 Ibid. 377; *Barnard* v. *Norton*, Kirby 193; *Meads*

v. *McDowell*, 5 Binn. 195. But even if the law were otherwise, there has been no unnecessary delay or want of notice in the present case.

The *Attorney-General* and *Jones*, contrà, contended, that the defendant was to be considered in the character of a surety merely; that this was evinced by every part of the correspondence; and that, consequently, he was bound only according to the literal terms of his contract. That by the well-established doctrine of law and equity, a different rule was to be applied, in the construction of the contract of the surety, from that which was applicable to the contract of the principal. In regard to the principal, a liberal interpretation is to be indulged, to reach the substance and equity of the contract; whilst the undertaking of the surety is to be limited to its precise terms. The reasons of this distinction are, that there is a valuable consideration moving from the creditor, which creates an equitable obligation on the part of the principal, independent of the express contract; whilst, in respect to the surety, there is nothing but his express promise, acceding to that of the
*141] principal *debtor. Another reason is one of legal policy, to encourage suretyships, for the benefit of commerce, and the extension of credit, and at the same time to protect the sureties by every means consistent with morality. All the cases at law are consonant with this distinction. *Lord Arlington* v. *Merick*, 2 Saund. 411, and Sergeant Williams' note, 5, p. 415; *Wright* v. *Russell*, 3 Wils. 530; s. c. 2 W. Bl. 934; *Myers* v. *Edge*, 7 T. R. 254; *Barker* v. *Parker*, 1 Ibid. 287; *Ludlow* v. *Simond*, 2 Caines' Cas. 1; *Walsh* v. *Bailie*, 10 Johns. 180; *Russell* v. *Clarke*, 7 Cranch 90. The aid of the courts of equity has been invoked in vain, to effect a more enlarged construction of the undertaking of sureties. Maxims in Equity 71; *Simpson* v. *Field*, 2 Ch. Cas. 22; *Rees* v. *Barrington*, 2 Ves. jr. 540. Besides, whatever was the undertaking of the defendant, in the present case, the plaintiff considered the order contained in the letter of the 9th of January, as completely abrogated by the letter of the 13th of February, after which date, the principals step in, and the plaintiff acts under their orders, and corresponds with them only. By the last-mentioned letter, the defendant promises to answer bills, drawn on himself only, which was a new undertaking on his part, under which he could not be liable for bills drawn on Taber & Son. Nor did the plaintiff give the defendant any notice of those bills being drawn, which omission would alone be sufficient to discharge him from his liability.

D. B. Ogden, in reply, insisted, that though the surety could not be made responsible beyond the tenor of his engagement, he could not be dis-
*142] charged *by implication, still less, by studied ambiguity of language and artifice of conduct. That the great fundamental principle, in the interpretation of contracts, is to carry into effect the intention of the parties, and that this principle was peculiarly applicable to commercial contracts. That where there is a doubt, arising from the ambiguity of expressions, the acts of the parties may be resorted to, as supplementary evidence of their intention. That even supposing there had been a revocation, or modification, of the original contract, on the part of the defendant, he is still liable under his subsequent undertaking. No case can be found, where a mere attempt to recover of the principal will discharge the surety. All the authorities are the other way. The drawing the bills on Taber & Son was not a waiver of the defendant's liability. Nor was any notice to the defendant necessary,

any more than on a bill of exchange, where the want of funds in the drawee's hands dispenses with the necessity of notice. So, in this case, the defendant having no funds in the hands of Taber & Sons, notice to him would not have enabled him to get into his own hands the means of securing himself.

February 17th, 1818. JOHNSON, Justice, delivered the opinion of the court.—This case comes up on a bill of exceptions. This charge of the judge was given *pro formâ*, generally, against the plaintiff, and the verdict conforms to it. There are many counts in the declaration, and if on any one of those counts, the plaintiff was entitled to recover, the judgment below must be reversed.

*The first count is on a refusal to pay two sets of bills, drawn on [*143
Taber & Son, of Portland, payable in New York. These bills were duly protested and returned, and the amount, with damages, refunded by the plaintiff. In defence to this count, it is contended: that the undertaking of Barker, as expressed in his letter of the 9th of January 1806, relates to a different transaction from that upon which this cotton was purchased; that this transaction originated in the letters of the 26th of January, or 24th of July 1806, or of the 20th February 1807, and in neither of those letters is the undertaking, on bills to be drawn on Taber & Son, reiterated: that the letters alluded to contain, in fact, an implied revocation of the undertaking in the letter of the 9th, of which the plaintiff was bound to take notice.

To the correctness of these positions, this court cannot yield its assent. Nothing could be more inconsistent with that candor and good faith which ought to mark the transactions of mercantile men, than to favor the revocation of an explicit contract, on the construction of a correspondence nowhere avowing that object. It was in the defendant's power to have revoked his assumption, contained in the letter of the 9th, at any time prior to its execution, but it was incumbent on him to have done so, avowedly, and in language that could not be charged with equivocation. In this case, we discover nothing from which such an intention can fairly be inferred. The whole correspondence refers to the same subject, and has in view the same object. The expediting of the ship *Mac on freight, if freight could be ob- [*144
tained, and if not, to be filled up (at least, to the quantity of cotton here purchased), on owners' account. This agency the plaintiff undertakes, expressly on the credit of Barker, for a house, with whose credit, except on his introduction, he is unacquainted; and so far from restricting the order contained in the letter of the 9th, there is not one from the defendant, in the subsequent correspondence, that does not enlarge the order as to quantity, upon the contingency of the ship not getting freight.

But it is contended, although the original assumption may not have been revoked, it was not complied with, according to the terms in which it was expressed, and therefore, was not binding to the defendant. And on this ground, so far as relates to the bills in this count, the court is of opinion, that the defence is supported on legal principles. The assumption is to guaranty bills, "drawn on Taber & Son, Portland, or me, at 60 days sight." These bills are drawn on Taber and Son, Portland, payable in New York. Now, although we cannot see why an honorable discharge of his contract did not prompt the defendant to accept these bills for the

honor of the drawer, when they were returned to New York for non-acceptance, yet as it is our duty to construe the contracts of individuals, and not to make them, we are of opinion, that these bills were not drawn in conformity to the assumption of the defendant. Merchants well understand the difference between drawing bills upon a specified place, and drawing them upon one place, payable in another. We are not to inquire into the
*145] *reasons which govern them in forming such contracts, or competent to judge, whether any other mode of complying with a contract may not be as convenient to them, as that which they have consented to be governed by. But it will be perceived, that this opinion can only affect the right of the plaintiff to recover the damages paid by him on the return of those bills, and has no effect in this view of the case, upon the plaintiff's right to recover upon the original guarantee of this debt; when legally demanded.

It is, however, contended, that the election to draw in this form, was conclusive upon the plaintiff, and he could not afterwards resort to a draft upon the defendant himself. And this brings up the question upon the plaintiff's right to recover upon the second count. This count is on a refusal to pay a bill drawn on Barker himself, for the exact balance of the invoice of the cotton, after crediting the defendant with the bills that he had paid. This bill was not negotiated and returned, but drawn in favor of an agent of the plaintiff, and of course, no damages are demanded on it. The defence set up to this count, to wit, that the plaintiff, by making his election to draw upon Taber & Son, is thereby precluded from resorting to Barker, we think, cannot be sustained. It is in vain that we look for any passage in the correspondence, that holds out this idea, nor is there anything in the nature of the transaction, that will sanction this court in attaching such a restriction to Barker's undertaking. It was, in effect, a promise to
*146] furnish the funds necessary to carry into execution this adventure. *Had it contained a mere guarantee of bills to be drawn on Taber & Son, there might have been some ground for this argument; but where the defendant confers the right to draw upon himself, and, in fact, clearly recommends a preference to such bills, he makes himself the paymaster, and we consider it an original substantive undertaking. In this view of the case, the law quoted on the subject of securityship undertakings cannot be applicable, and we think the plaintiff ought to recover on this count.

There are other items in the plaintiff's demand, on which, as the case will be sent back, it is necessary to express an opinion. The first is the charge of about $1200 for services and expenses incident to this agency; the other is the charge of interest. The first of these items we are clearly of opinion the plaintiff is entitled to, and that it is recoverable, under the counts for services performed, and money expended in the discharge of this undertaking. And as to the second, we are equally satisfied, that interest is recoverable under the second count, in nature of damages.

But some difficulty has arisen on the question, whether the plaintiff is entitled to recover the interest of New Orleans, or of New York. The former the bill of exceptions states to be ten per cent.; the latter, seven per cent. Where a general authority is given to draw bills from a certain place, on account of advances there made, the undertaking is to replace the money at that place. Had this bill on Barker been negotiated, and returned, under

protest, the holder would have been entitled to demand of the drawer the interest of *New Orleans, and thus, incidentally, at least, the defendant would have been compelled to pay the plaintiff that interest. [*147 But it may be contended, that as the letter of the 26th appears to restrict the order for this purchase, so as to make it depend on the condition of the practicability of negotiating bills on New York, the undertaking of Barker was limited to payments to be made in New York. On this point, the court are of opinion, that, even though we attach this condition to Barker's undertaking, the liability to replace the money at New Orleans still continued; and any necessary loss on the bills, on account of the difference of exchange, would have been chargeable to the defendant; but we think, further, that the restrictive words in the letter alluded to, may justly be considered as enlarged into a general order, in his subsequent correspondence. The court is, therefore, of opinion, that as the money was advanced at New Orleans, and to be replaced at New Orleans, the plaintiff may claim the legal interest at that place.

This court is of opinion, that there is error in the judgment below, and that it must be reversed. But this court can do no more than order a *venire facias de novo*.

An attempt has been made to obtain from this court a mandate to the circuit court, to enter a judgment in conformity to an agreement of parties entered on the transcript, which states the amount to be adjudged to the plaintiff upon several alternatives. But we are of opinion, that this court can take no notice of that consent; the verdict presents no alternative; *and the consent entered on the transcript, or on the minutes of the circuit court, forms no part of the record brought up by this writ of [*148 error. Nor will this court be led into the exercise of a power so nearly approaching the province of a jury in assessing damages.

Judgment reversed.(*a*)

(*a*) Although contracts of guaranty are very familiar in the practice of the commercial world, comparatively few cases have been subjected to judicial decision in the English and American tribunals. It may not, however, be without use to the learned reader, to collect the principal adjudications on this subject, especially, as no attempt has yet been made to bring them before the public in a connected view.

Contracts of guaranty, like all commercial contracts, have received a liberal interpretation, in furtherance of the intention of the parties. But at the same time, they are not extended beyond the obvious import of the terms in their reasonable interpretation. Where, in a letter of introduction of a mercantile firm, the defendants used the following terms—"We do ourselves the pleasure of introducing them to your correspondence, as a house on whose integrity and punctuality, the utmost dependence may be placed; they will write you the nature of their intentions, and you may be assured of their complying fully with any contract or engagements they may enter into with you," it was held, that the letter did not import a guarantee of such engagements; and that parol evidence was not admissible, to explain the terms so as to affect their import, with regard to the supposed guaranty. Russell *v.* Clarke, 8 Dall. 415; s. c. 7 Cranch 69. So, where B. wrote to C., "as I understand Messrs. A. & Co. have given you an order for rigging, &c., which will amount to 4000*l*. I can assure you, from what I know of A.'s honor and probity, you will be perfectly safe in crediting them to that amount; indeed, I have no *objection to guaranty you against any loss, from [*149 giving them this credit;" it was held, that the writing did not import a perfect and conclusive guarantee, but only a proposition or overture tending to a guarantee;

and that to make it a guarantee, B. ought to have had notice, that it was so regarded, and meant to be accepted, or there should have been a subsequent consent on his part, to convert it into a conclusive guarantee. McIver *v.* Richardson, 1 M. & S. 557. But it is said, that the words are to be taken as strongly against the party giving the guarantee, as the sense of them will admit of. Therefore, where the defendant wrote to the plaintiff, "I hereby promise to be responsible to T. M. (the plaintiff) for any goods he hath or may supply my brother W. P. to the amount of 100*l.*," it was held, that this was a standing or continuing guarantee to the extent of 100*l.*, which might at any time become due, for goods supplied, until the credit was recalled. At the time the letter was written, goods had been supplied, to the amount of 66*l.*, and afterwards, another parcel was delivered, amounting, together with the former, to 124*l.*, all which had been paid for, and the sum now in dispute (and which by the judgment of the court, the plaintiff recovered), was for a further supply to W. P. Mason *v.* Pritchard, 2 Camp. 436; s. c. 12 East 227. So, where the defendant wrote to the plaintiff, "I have been applied to by my brother, W. W., to be bound to you for any debts he may contract, not to exceed 100*l.* (with you), for goods necessary in his business as a jeweller; I have wrote to say, by this declaration, I consider myself bound to you for any debt he may contract for his business as a jeweller, not exceeding 100*l.*, after this date;" Lord ELLENBOROUGH said, that the defendant was answerable for any debt not exceeding 100*l.*, which W. W. might, from time to time, contract with the plaintiff, in the way of business; that the guarantee was not confined to one instance, but applied to debts successively renewed; and that if a party meant to be a surety only for a single dealing, he should say so. Merle *v.* Wells, 2 Camp. 413. So, where the defendant wrote, *150] "I hereby undertake and engage to be answerable to the extent of *300*l.* for any tallow or soap supplied by Mr. B. (the plaintiff) to F. & B., provided they shall neglect to pay in due time;" Lord ELLENBOROUGH held it to be a continuing guarantee, while the parties continued to deal on the footing established when it was given; but that goods supplied, after new arrangements were made, were not within the scope of the guarantee; and he relied on the word "any," without which, he thought it might, perhaps, be confined to one dealing to the amount of 300*l.* Baston *v.* Bennett, 3 Camp. 220. But in debt on a bond entered into by A. and B. with the plaintiffs, reciting, that it was to enable A. to carry on his trade, and conditioned for the payment of all such sum or sums of money, not exceeding 3000*l.*, with lawful interest, which should or might, at any time or times thereafter, be advanced and lent by the plaintiffs to A., or paid to his use, by his order and direction," it was held, that it was a guarantee for the definite amount of 3000*l.*, and when an advance was made to that amount, the guarantee became *functus officio*, and was not a continuing guarantee. Kirby *v.* Duke of Marlborough, 2 M. & S. 18. And, where the defendants wrote to the plaintiff, "If W. & B., our sons, wish to take goods of you, on credit, we are willing to lend our names as security for any amount they may wish," the court held, that it was not a continuing guarantee, but was confined to the first parcel of goods sold to W. & B.; that it gave an unlimited credit as to amount, but was silent as to the continuance of the credit to future sales, and *expressio unius, est exclusio alterius*. Rogers *v.* Warner, 8 Johns. 119. And in a very recent case, where the defendants wrote to the plaintiff, "our friends and connections, S. & H. H., contemplate, under certain circumstances, making a considerable purchase of goods on the continent, and for that purpose, are about to send an agent to Europe; they wished a letter of credit from us, to increase their means and to be used or not as circumstances may require; as we are now indebted to you, and have no funds on the continent of Europe, we told them, we could not give *151] a positive letter of credit for any sum, but that we had no doubt, you would *be disposed to furnish them with funds under our guarantee; the object of the present letter is, therefore, to request you, if convenient, to furnish them with any sum they may want, as far as $50,000, say, 50,000 dollars; they will reimburse you the amount they receive, together with interest, as soon as arrangements can be made to do it; we shall hold ourselves answerable to you for the amount;" it was held, that this was a guarantee for a single advance to the amount of $50,000, and not a continuing

guarantee, *toties quoties*, to that amount, and that as soon as $50,000 were once advanced, the guarantee ceased to operate upon future advances, although by intermediate payments, the sum due at the time of such new advances, was below $50,000. Cremer *v.* Higginson, 1 Mason 323.[1] Where A. requested B. to give C. any assistance in the purchase of goods, by letter, or otherwise, adding, "you may consider me accountable with him to you, for any contract he may make; it was held, that A. was to be considered as a guarantor, and not a joint-debtor, and that a contract by C. with B. to pay him a premium for guarantying a contract of C. with a third person was within A.'s promise. Meade *v.* McDowell, 5 Binn. 195.

A guarantee to the plaintiffs, "that if they will credit D. a sum not exceeding $500, in case he shall not pay it in twelve months, the guarantor will pay it," does not imply a condition that the plaintiff may not advance more than $500, if the additional advance be on the general credit of D. Sturges *v.* Robins, 7 Mass. 301.

A guarantee, "we, jointly and severally, promise to guarantee a payment of 500*l.* at five per cent. say, by a bill drawn on G. H., by D. & F. for 500*l.*, dated 10th of January 1808," is to be construed as a general guarantee of the bill, not (as usual) a guarantee that the acceptor should pay, but a contract that either the drawer or the acceptor should pay. Philips *v.* Astling, 2 Taunt. 206. But upon such a guarantee (if it is to be construed as limiting the bill to the specific sum of 500*l.*), the guarantor would not be liable to the extent even of the 500*l.*, if the bill be drawn *for a larger sum; [*152
for the terms of the contract must be strictly complied with. Ibid. And a guarantee to A., for goods to be sold by him, on credit, to B., will not inure to the benefit of a third person, who shall actually furnish the goods to B., although at the request of A., for a surety is not to be held beyond the scope of his own engagement. Robbins *v.* Bingham, 4 Johns. 476; Walsh *v.* Bailie, 10 Ibid. 180. And see 1 M. & S. 557. So, if a letter of credit be addressed to A., and part of the goods are delivered by A., and part by C. & D., the latter cannot recover on the guarantee. Robbins *v.* Bingham, 4 Johns. 476. So, a letter of guaranty, addressed to J. & A. N., by mistake, for J. & J. N., will not cover advances made by the latter, on the faith of the letter. Grant *v.* Naylor, 4 Cranch 224.

Many cases analogous to this have been decided. As, where A. became surety, by bond, that B should truly account to C. for all sums of money received by B., for C.'s use, and afterwards, B. took a partner, with C.'s knowledge, it was ruled, that the guarantee did not extend to sums received by B. and his partner, for C.'s use, after the formation of the partnership. Bellairs *v.* Elsworth, 3 Camp. 53. So, a bond conditioned to repay all sums advanced by five persons, or any of them, was held not to extend to sums advanced, after the decease of one of them, by the four survivors, the four then acting as bankers. Weston *v.* Barton, 4 Taunt. 674. And to the same effect will be found the following cases: Arlington *v.* Merritt, 2 Saund. 44; Wrightly *v.* Russell, 2 W. Bl. 934; s. c. 3 Wils. 539; Barker *v.* Parker, 1 T. R. 287; Myers *v.* Edge, 7 Ibid. 254; Strange *v.* Lee, 3 East 484. But if a bond be given to trustees, conditioned for the faithful service of a person, during his continuance in the service of a fluctuating or successive body of persons, not incorporated, as the Globe Insurance Company, it will extend to the whole time the party is in the service of such company, although the members may be continually changing. Metcalf *v.* Bruin, 12 East 400. An agent, in England, for merchants, the vendors of goods, in Russia, who guaranties "that the shipment shall be in conformity with the revenue laws of Great Britain, so that no impediment *shall arise upon the importation thereof, or that, in default, the conse- [*153
quence shall rest with the sellers," makes himself personally responsible to the vendee. Readhead *v.* Cator, 1 Stark. 14. An impediment arising from non-compliance with the navigation act, is an impediment within the terms of the guarantee. And such a guarantee is not within the statute of frauds, if the terms of the agreement can be collected from the written correspondence between the parties. Ibid. A.

[1] Aldricks *v* Higgins, 16 S. & R. 212; Anderson *v.* Blakely, 2 W. & S. 237.

engages to guaranty the amount of goods supplied by B. to C., provided 18 months credit be given; if B. give credit for 12 months only, he is not entitled, at the expiration of six months more, to call upon A. on his guarantee. But B. having, after the commencement of the action, delivered an invoice, from which it appeared that credit was given for 12 months only, is at liberty to show that this was a mistake, and that, in fact, 18 months credit was given. Bacon *v.* Chesney, 1 Stark. 192.

In cases of guaranty, it has been made a question, whether the notice ought to be given to the guarantor of the advances made, and of the non-payment by the debtor. In Oxley *v.* Young, 2 H. Bl. 613, where the defendant, upon an undertaking of D. to indemnify him, guarantied to the plaintiff, an order sent to him by A. for certain goods, and the plaintiff informed the defendant, that the goods were preparing, but did not give him notice of the actual shipment, the court thought that the right to sue on the guarantee attached, when the order was put in a train for execution, subject to its being actually executed; and that the notice of such intended execution was sufficient; and the court further thought, that that right could not be divested, even by a wilful neglect of the plaintiff, though, perhaps, he might be liable to an action on the case, at the suit of the defendant, if any such neglect could be shown, contrary to all good faith, and by which a loss had been incurred. In Peel *v.* Tatlock, 1 Bos. & Pul. 419, Chief Justice EYRE appears to have been of opinion, that at least, in guarantees for good behavior, notice of any embezzlement or fraud ought to be given, within a reasonable time; but the case finally went off upon narrower grounds. In *Russell *v.*
*154] Clarke, 7 Cranch 69, 92, it was distinctly held by the court, that if the contract in that case had been a guarantee, it would certainly have been the duty of the plaintiff, to have given immediate notice to the defendant of the extent of his engagement. And the same doctrine was asserted in the circuit court, in Cremer *v.* Higginson, already cited.[1]

Where there is a guarantee of advances or supplies, it is necessary, in the first instance, to make a demand of payment from the original debtor, or, at least, to use reasonable diligence in endeavoring to make such demand, and notice of non-payment must be given in a reasonable time to the guarantor. This may be collected as the general result of the cases on this subject. But where an agent, in England, for merchants, the vendors of goods, in Russia, who guaranties "that the shipments shall be in conformity with the revenue laws of Great Britain, so that no impediment shall arise upon the importation thereof, or that, in default, the consequence shall rest with the sellers," it was held, that the agent made himself personally responsible to the vendee, and that in a declaration upon such a guarantee, against the agent, it is unnecessary to allege any application for indemnity to the principals. Readhead *v.* Cator, 1 Stark. 14. And it is not necessary to sue the debtor, before the right attaches to sue on the guarantee. Bank of New York *v.* Livingston, 2 Johns. Cas. 409. And where the guarantee is of a note or bill, payable at a future time, although it is not necessary to pursue the same strictness, in order to charge a guarantor, as to charge the drawer; yet a due demand and notice of non-payment ought to be given to the drawer and guarantor; and if the necessary steps are not taken to obtain payment from the parties who are liable on the bill, and solvent, the guarantor is discharged. Phillips *v.* Astling, 2 Taunt. 206; Warrington *v.* Furber, 8 East 245. But it is a sufficient excuse for not making a demand, that the debtor cannot be found, or that he is insolvent. Warrington *v.* Furber, 8 East 245; Phillips *v.* Astling, 2 Taunt. 206. And if there be gross *laches* in
*155] securing the debt (Duval *v.* Trask, 13 Mass. 154; People *v.* Jansen, *7 Johns. 332; Hunt *v.* United States, 1 Gallis. 34); or if the creditor undertake to do anything whereby to lessen or postpone the responsibility of the debtor (Commissioners of Berks *v.* Ross, 3 Binn. 520); or if the right of the parties be altered, as, if any new debt have been incurred; or if the demand have been enlarged, to the prejudice of the guarantor (Peel *v.* Tatlock, 1 Bos. & Pul. 419; King *v.* Baldwin, 2 Johns. Ch. 554; Boultbee *v.* Stubbs, 18 Ves. 20); or if the creditor give time to his debtor, without the

[1] Kellogg *v.* Stockton, 29 Penn. St. 460.

knowledge of the guarantor (Skip *v.* Huey, 3 Atk. 91; 6 Ves. 809, note *a;* Rees *v.* Berrington, 2 Ves. jr. 540; Nisbet *v.* Smith, 2 Bro. C. C. 579; Moore *v.* Bowmaker, 6 Taunt. 379; s. c. 2 Marsh. 81); or if, upon a guarantee of a partnership debt, the partnership debt is discharged, by carrying the proportions of each partner to his separate account, without any notice to the guarantor (Cremer *v.* Higginson, 1 Mason 323); or if there be a fraudulent concealment, to the injury of the guarantor (Oxley *v.* Young, 2 H. Bl. 613, *semble*, EYRE, C. J.); in all these cases, the guarantor is discharged. And it has been held, in a recent case, that if the holder of a note is requested by the surety (being one of the joint-makers), to proceed without delay, and collect the money of the principal, who is solvent, and he omits to do it, until the principal becomes insolvent, the surety will be exonerated at law. (Paine *v.* Packard, 13 Johns. 174.) But this decision has been questioned by very high authority. (King *v.* Baldwin, 2 Johns. Ch. 563, 564.) Where there are several debts due, some of which are guarantied and some not, and payments are made by one debtor, the same general rule applies in this, as in other cases, that where the debtor makes no application of any payment, the creditor may apply it to any account he pleases. (Kirby *v.* Duke of Marlborough, 2 M. & S. 18; Dawson *v.* Remnant, 6 Esp. 26; Field *v.* Holland, 6 Cranch 8; Hutchinson *v.* Bell, 1 Taunt. 558; Sturgis *v.* Robbins, 7 Mass. 301.)

Pothier, in his Treatise on Obligations, has discussed with great learning and ingenuity, the whole doctrine of suretyship and guarantee. *Traité des Obligations*, part 2, ch. 6, § 1 to 8. Among other things, he remarks, that care should be [*156 taken not to take for a promise to become surety, what one says or writes, unless there be a well-marked intention to do so. Therefore, he adds, if I wrote or said to you, that a man who asked you to lend him money, was solvent, this could not be taken for an agreement to become a surety, for I might well have no other intention than to inform you of what I believed to be the case, and not to bind myself. On this principle, it was adjudged, in a case reported in Papon, X. 4, 12, that these words in a letter to the keeper of a boarding-house, "A. B. intends to send his son to board with you; he is an honest man, and will pay you well," did not include an obligation. On the same principle, if I accompany a person to a woollen-draper's, where he buys cloth, the draper ought not to conclude, that I am security for him. The following distinctions and principles stated by this learned writer, seem worthy of notice, in reference to the subject of this note. 1. Where the surety has expressed the sum and cause for which he became surety, his obligation does not extend beyond the sum and cause expressed. As, if one become bound for the principal debt, he will not be liable for interest. 2. On the other hand, when the words of the suretyship are general and indeterminate, the surety is presumed to have bound himself for all the obligations of the debtor, resulting from the contract to which he acceded; and therefore, a surety, in general terms, is bound not only for the principal sum, but for interest; and not only for the interest due *ex rei natura*, but for that occasioned by the delay of the debtor. And this is conformable to the doctrine of the Roman law. 3. And in general, however unlimited the suretyship may be, it does not extend to the penalties to which the debtor may be condemned *officio judicis propter suam contumaciam.* 4. The obligation of suretyship is extinguished, by an extinction of the principal debt; by the creditor's disabling himself, by his own act, from ceding his action against his principal debtor, which the surety has an interest in having assigned to him; by the creditor's accepting in payment property, the title to which afterwards proves to be invalid, at least, if the principal debtor in *the meantime becomes insolvent. 5. And the principal debt may [*157 be extinguished, not only by payment, or a set-off, or release, but also by a novation of the debt, that is, by accepting a new obligation in discharge of the old one. 6. Pothier then puts the case, whether the surety be discharged, by the creditor's granting to the debtor a delay for the payment, and agrees with Vinnius, in holding the negative, for he says, the simple delay, not making the debt appear discharged, deprives the surety of no means of providing for his own safety, and the surety cannot pretend, that the delay prejudices him, since he himself derives an advantage from it. 7. According to the principles of the ancient civil law, the creditor could demand payment

from the surety, without first resorting for payment to the principal debtor. But Justinian altered that rule, and gave to the surety an exception or plea, which is called an exception of discussion, or of order, by which he may require the creditor to proceed, in the first instance, against the principal debtor. And this rule, with some exceptions, was adopted into the ancient jurisprudence of France. But at no time, either in the civil or French law, did the bringing of a suit by the creditor, against his principal debtor, discharge the surety, who, therefore, remained bound, until payment. And the omission of the creditor to institute a suit of discussion, against the principal debtor, notwithstanding a request of the surety, until after the debtor becomes insolvent, is not thought to discharge the surety. But if a surety had contracted only to pay what the creditor could not obtain from the principal debtor, an omission to sue, for a long time, and until after an insolvency, may discharge the surety. 8. To entitle the surety, after payment, to recover over against the principal debtor, it is necessary, that the surety should not have neglected, by his own fault, to plead any proper plea in bar of the creditor ; that the payment should have been valid, and should have discharged the principal debtor ; and that the principal debtor should not have paid a second time, by the fault of the surety. See Pothier, *Traité des Obligations*, part 2, ch. 6, § 1 to 8. The Code Napoléon, or civil code, adopts, for the most
*158] part, the *doctrines stated in Pothier. Liv. 3, tit. 14, art. 2011 to 2043. It declares, that a guarantee or suretyship (*cautionnement*) ought not to be presumed; it ought to be express; and ought not to be extended beyond the limits of the contract itself. An indefinite guarantee of a principal obligation extends to all the accessories of the debt. The guarantor is not bound to pay, but upon the default of the debtor, who ought, in the first instance, to be sued by discussion, against his goods. In a suit against the guarantor, he may enter the same exceptions to the debt (except they are purely personal) as the principal debtor may. The surety is discharged, when, by the act of the creditor, the guarantor cannot have the benefit of a substitution to the rights, hypothecation and privileges of the creditor. A simple postponement of the time, granted by the creditor to the debtor, does not discharge the guarantor, who may, however, in that case, pursue the debtor to enforce payment. Code Napoléon, *ubi supra*.

See also, the Digest of the Civil Laws of Louisiana, p. 429. Erskine's Institutes of the Laws of Scotland, 10th ed., 326. The coincidences between the doctrines of the common law, and those of the civil law, and the codes derived from it, are very striking; and the differences in particular cases, seem to result rather from the difference of the remedies of guarantors and sureties, under the various systems (which, of course, require a corresponding change as to their liability), than from any theoretical opposition in principles.

*Hughes v. Union Insurance Company.

Marine insurance.—Deviation.

Insurance on a vessel and freight, "at and from Teneriffe to the Havana, and at and from thence to New York, with liberty to stop at Matanzas," with a representation, that the vessel was "to stop at Matanzas, to know if there were any men of war off the Havana;" the vessel sailed on the voyaged insured, and put into Matanzas, to avoid British cruisers, who were then off the Havana, and were in the practice of capturing neutral vessels trading from one Spanish port to another; while at Matanzas, she unladed her cargo, under an order from the Spanish authorities; and afterwards, proceeded to Havana, whence she sailed on her voyage for New York, and was afterwards lost, by the perils of the seas. It was proved, that the stopping and delay at the Havana was necessary to avoid capture, that no delay was occasioned by discharging the cargo, and that the risk was not increased, but diminished: [1]

Held, that the order of the Spanish government was obtained under such circumstances as took from it the character of a *vis major* imposed upon the master, and was, therefore, no excuse for discharging the cargo; but that the stopping and delay at Matanzas were permitted by the policy, and that the unlading the cargo was not a deviation.[2]

This case distinguished from that of the Maryland Ins. Co. *v.* Le Roy, 7 Cranch 26.

Error to the Circuit Court for the district of Maryland. This was an action of *assumpsit*, brought on a policy insuring the ship Henry and her freight, "at and from Teneriffe to the Havana, and at and from thence to New York, with liberty to stop at Matanzas."

At the trial, the plaintiff gave in evidence the representation on which the policy was made, which contained this expression: "We are to stop at Matanzas, *to know if there are any men of war off the Havana." The vessel sailed from Teneriffe, on the 7th of April 1807, and on the 7th [*160 of June following, put into Matanzas, in the island of Cuba, to avoid British cruisers, who were then cruising on her way to, and off the port of, Havana, and who were then in the practice of capturing American vessels sailing from one Spanish port to another. On the 6th of July, as soon as the passage was clear, she proceeded to the Havana, whence, on the 14th of July, she sailed on her voyage to New York. On the 28th of that month, she

[1] A deviation consists in a variation of the risks insured against, without necessity or reasonable cause; if the risks be varied, the underwriter is discharged, though they be apparently diminished. Child *v.* Sun Mutual Ins. Co., 3 Sandf. 26. If a vessel lie by, at an intermediate part, to repair a defect, known at the commencement of her voyage, and be there destroyed by fire, it is a deviation, which discharges the underwriters. Audenreid *v.* Mercantile Mutual Ins. Co., 60 N. Y. 482.

[2] A delay in port will not amount to a deviation, if there be circumstances sufficient to justify it; and if justifiable, the taking in cargo will not render it a deviation. Foster *v.* Jackson Marine Ins. Co., Edm. S. C. 290. So, if the master, being delayed by adverse winds and danger, put into a place of safety, in his course, and send ashore for provisions, it is not a deviation. Thomas *v.* Royal Exchange Assurance Co., 1 Price 195. On a policy at and from London to New South Wales, and from thence to the ship's loading port or ports, in the East Indies, and elsewhere, and that she might proceed and sail to, and touch and stay at, any ports or places whatsoever and wheresoever, and for any purpose whatsoever; the ship sailed from London, with convicts, to New South Wales there; having discharged them, she proceeded in ballast to Batavia, where she took on board a quantity of corn, and discharged the same at Sourabuya, and was there loaded with a full cargo of rice, with which she proceeded to the Mauritius, where it was discovered that she had sustained an injury, and she was accordingly broken up: *held*, to be no deviation, although it was insisted, that by the terms of the policy, the ship was only to go to her loading ports, and not to trade or take in a fresh cargo. Arnet *v.* Innes, 4 Moore 150. And see Company of African Merchants *v.* British and Foreign Marine Ins. Co., 8 L. R., Exch. 154.

foundered at sea, and was totally lost. The action was for the insurance on the vessel and freight from the Havana. The underwriters gave in evidence, that while at Matanzas, she unladed her cago, and insisted, that this was a deviation, by which they were discharged. To repel this evidence, the plaintiffs showed, that the stopping and delay at Matanzas were necessary to avoid capture, and therefore, allowed by the policy; that no delay was occasioned by discharging the cargo; that the risk was not increased, but diminished by it; and that an order from the Spanish government had made this act necessary.

The court instructed the jury, that unlading the cargo at Matanzas was a deviation, which discharged the underwriters, unless it was rendered necessary, by the order of the Spanish government at the Havana. That in this case, the order did not justify such unlading, and that the underwriters were, consequently, discharged. Under these directions, the jury found a verdict for the defendants. The plaintiff having excepted to the opinion of
*161] the court, the judgment *which was rendered in favor of the defendants was brought before this court on writ of error.

February 12th. *Harper*, for the plaintiff, argued, that the unlading at Matanzas was by a mandate, and not a permission, from the Spanish government, which, being a *vis major*, excused the master. That in this case, the risk was not increased, but diminished, by stopping at Matanzas. Neither party is at liberty to vary the risk; but this rule applies to cases where the change may produce some inconvenience to the insurer, not where it does actually produce it merely. Unnecessary deviation always discharges the underwriters, because it may increase the risk. But here, the policy permitted the stopping and delay at Matanzas; and the risk not only could not be increased, but was actually diminished, by discharging the cargo, and proceeding with the vessel close along the shore to the Havana. This doctrine is not impugned in the *Maryland Insurance Company* v. *Le Roy*, 7 Cranch 26. That case went on the ground of variation from the terms of the policy. The taking on board the jack-asses might have increased the risk; but whether in point of fact it did, or not, the court said was immaterial. But in the present case, there is no variation from the terms of the contract; the risk neither was, nor could be, increased, by unlading the cargo. In *Raine* v. *Bell*, 9 East 195, Marshall on Ins., app'x, No. VIII.,
*162] 834 *a*, the court of K. B. determined, that a ship may *trade at a port where she has liberty to touch and stay, provided this occasions no delay, nor any increase or alteration of the risk. It has also been held, in the courts of our own country, that selling a part of the cargo during a necessary detention, does not discharge the insurers.

Winder and *Jones*, contrà, argued, that the proceedings of the Spanish authorities were a mere permission, which the party might use or not, at his pleasure, and not an imperious mandate, which he was compelled to obey. It is an elementary principle of insurance law, that whether the deviation increase the risk or not, it discharges the underwriters. 2 Emergon, *Des Assurances*, 558; Marsh. on Ins. 185, *et seq.* The case of the *Maryland Insurance Company* v. *Le Roy*, illustrates the rule, and the jury there found that taking on board the jack-asses did not increase the risk. Dis-

charging the cargo at a place where permission is only given to touch, is a deviation. Marsh. on Ins. 208, 275, and the cases there collected. It is immaterial, whether the risk be increased, or diminished, or remain the same *in quantum*. In *Raine* v. *Bell*, the jury found, that the vessel would have otherwise been necessarily detained, while she was taking in the cargo; and that case proves nothing more than that, while so detained, the master may take in cargo, but not break bulk. Staying to unlade, increases the risk; but taking cargo on board, while necessarily detained, does not increase or alter the risk.

D. B. Ogden, in reply, contended, that the question was whether during the necessary detention of the vessel the master had a right [*163 to land the cargo. The authority of *Kane* v. *Columbian Insurance Company* is conclusive to show that he had. If, according to *Raine* v. *Bell*, it be not a deviation, to take on board a cargo, at a port of necessity, neither is it a deviation, to land the cargo at a port of necessity. The case of the *Maryland Insurance Company* v. *Le Roy* is distinguishable. Where the master deviates, from necessity, his subsequent conduct, if *bonâ fide*, cannot discharge the insurers. But in this case, he acted in good faith for the benefit of all parties.

February 18th, 1818. MARSHALL, Ch. J., delivered the opinion of the court, and after stating the facts, proceeded as follows:—At the trial, the cause seems to have turned principally on the necessity to unlade the cargo at Matanzas, produced by the order of the Spanish government at the Havana. As this court concur with the circuit judge in the opinion, that this order was obtained under circumstances which take from it the character of a force imposed on the master, and compelling him to discharge his cargo, and is, therefore, no excuse for such discharge, it will be unnecessary further to notice that part of the case. The question to be considered is that part of the opinion, which declares, that unlading the cargo at Mantanzas, although it occasioned no delay, and did not increase, but did diminish the risk, was a deviation, which discharged the underwriters.

*In considering this question, it is to be observed, that the *termini* of the voyage were not changed. The Henry did sail from Teneriffe [*164 to the Havana, and was lost on the voyage from the Havana to Baltimore. The policy permitted her to stop at Mantazas, and the purpose of stopping was to know, if there were any men of war off the Havana. It would be idle to stop, for the purpose of making this inquiry, if it were not intended that the Henry might continue at Mantanzas, so long as the danger continued. The stopping and delay at Mantanzas is then expressly allowed by the policy.

But, admitting this, it is contended, that unlading the cargo is a deviation. And why is it a deviation? It produced no delay, no increase of risk, and did not alter the voyage. The vessel pursued precisely the course marked out for her in the policy. In reason, nothing can be found in this transaction, which ought to discharge the underwriters. If, however, the case has been otherwise decided, especially in this court, those decisions must be respected.

In *Stitt* v. *Wardel* (1 Esp. 610), it was determined, that liberty to touch and stay at any port did not give liberty to trade at that port; and in *Sheriff* v. *Potts* (5 Esp. 96), it was decided, that liberty to touch and discharge goods, did not authorize the taking in of other goods. These cases certainly bear with considerable force on that under consideration, but they were decided at *nisi prius*, and seem to have been in a great degree overruled by the court, in the case of *Raine* v. *Bell*, reported *in 9 East. *165] In that case, under a policy to touch and stay at any place, goods were taken on board, during a necessary stay at Gibraltar. The court was of opinion, that as this occasioned no delay, nor any increase or alteration of the risk, the plaintiff was entitled to recover. Between the case of *Raine* v. *Bell*, and this case, the court can perceive no essential difference. In the supreme court of Pennsylvania (*Kingston* v. *Girard*, 4 Dall. 274), a similar question occurred, and it was there held, that unlading and selling part of her cargo, by a captured vessel, during her detention, would not avoid the policy.

But it is contended, that this point has been settled in this court, in the case of the *Maryland Insurance Company* against *Le Roy* and others. In that case, a liberty was reserved in the policy, "to touch at the Cape de Verd Islands, for the purchase of stock, such as hogs, goats and poultry, and taking in water." The vessel stopped at Fago, one of the Cape de Verd Islands, and took in four bullocks and four jack-asses, besides water and other provisions, unstowed the dry-goods, and broke open two bales, and took 40 pieces out of each, for trade. The vessel remained at the island, from the 7th to the 24th of May, although the usual delay at those islands for taking in stock and water, when the weather is good, is from two to three days. The weather was good during this delay; and the bullocks and jack-asses incumbered the deck of the vessel, more than small stock would have done. The court left it to the *jury to determine, whether *166] the risk was increased by taking the jack-asses on board, and directed them to find for the plaintiffs, unless the risk was thereby increased. The jury found for the plaintiffs; and this court reversed the judgment rendered on that verdict, because the taking in the jack-asses was not within the permission of the policy.

It is perfectly clear, that the case of the *Maryland Insurance Company* v. *Le Roy and others*, differs materially from this. In that case, articles were taken on board which incumbered the deck of the vessel, and which were not within the liberty reserved in the policy. In that case, too, the assured traded, and the delay was considerable and unnecessary; the risk, if not increased, might be, and certainly was, varied. The judge, therefore, ought not to have left it to the jury, on the single point of increase of risk by taking in the jack-asses. Although the risk might not be thereby increased, the unauthorized delay and unauthorized trading, during that delay, connected with taking on board unauthorized articles, discharged the underwriters, according to the settled principles of law; and the court does not say, in that case, that these circumstances were immaterial or without influence. The court does not feel itself constrained by the decision in the *Maryland Insurance Company* v. *Le Roy et al.*, to determine, that in this case also, which differs from that in several important circumstances, the

underwriters are discharged. *The judgment is reversed, and the cause remanded, with directions to issue a *venire facias de novo.*

Judgment reversed.(*a*)

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*Swan *v.* Union Insurance Company of Maryland. [*168

Marine insurance.—Loss.

To entitle the plaintiff to recover in an action on a policy of insurance, the loss must be occasioned by one of the perils insured against.[1] The insured cannot recover for a loss by barratry, unless the barratry produced the loss; but it is immaterial, whether the loss, so produced, occurred during the continuance of the barratry, or afterwards.

Error to the Circuit Court for the district of Maryland. This was an action on a policy of insurance upon the schooner Humming Bird, at and from New York to Port au Prince, and at and from thence back to New York.

The policy was dated on the 21st of July 1810, and the vessel sailed on the voyage insured, on the 5th of that month. About the 5th of August following, she arrived at Port au Prince, and was there stripped of her sails, and a considerable part of her rigging, by one James Gillespie, to whom she had been chartered for the voyage. This was done, with the knowledge and acquiescence of the master, either for the purpose of procuring the loss of the vessel, or of fitting up another vessel, which Gillespie wished to dis-

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(*a*) In the case of Urquhart *v.* Barnard, it was held by the English court of C. B., that if a ship has liberty to touch at a port, it is no deviation, to take in merchandise, during her allowed stay there, if she does not, by means thereof, exceed the period allowed for her remaining there. And that, if liberty be given to touch at a port, the contract not defining for what purpose, but a communication having been made to the underwriter, that the ship was to touch, for a purpose of trade, it shall be intended as a liberty to touch for that purpose. 1 Taunt. 450. Liberty to touch at a port for any purpose whatever, includes liberty to touch for the purpose of taking on board part of the goods insured. Violet *v.* Allnutt, 2 Taunt. 419. Under a liberty to touch and stay at all ports, for all purposes whatsoever, the stay must be for some purpose connected with the furtherance of the adventure. Whether the purpose is within the scope of the policy, is a question for the court. The policy not limiting the time of stay, whether a ship has stayed a reasonable time for the purpose, is purely a question for the jury. Langhorn *v.* Alnutt, 4 Taunt. 511.[2]

[1] Smith *v.* Universal Ins. Co., 6 Wheat. 176; Coles *v.* Marine Ins. Co., 3 W. C. C. 159; Boon *v.* Ætna Ins. Co., 12 Bl. C. C. 24; Mathews *v.* Howard Ins. Co., 11 N. Y. 9. If, however, the peril insured against were the proximate, though not the immediate cause of loss, the insurers are liable. Brown *v.* St. Nicholas Ins. Co., 2 J. & Sp. 231; s. c. 61 N. Y. 332; Insurance Co. *v.* Boon, 95 U. S. 130. And see Insurance Co. *v.* Tweed, 7 Wall. 44. Where different causes concur in occasioning a loss, the rule is, that the loss must be attributed to the efficient predominating peril, whether that peril were, or were not, in activity, at the time of the final consummation of the disaster. Dole *v.* New England Mut. Marine Ins. Co., 2 Cliff. 394; Howard Fire Ins. Co. *v.* Norwich and New York Transportation Co., 12 Wall. 194. And in case of the concurrence of two causes of loss, one at the risk of the assured, and the other insured against, if the damage by the perils respectively can be discriminated, each party must bear his proportion. Norwich and New York Transportation Co. *v.* Western Massachusetts Ins. Co., 6 Bl. C. C. 291; s. c. 12 Wall. 201; Howard Fire Ins. Co. *v.* Norwich and New York Transportation Co., *ut supra.*

[2] See Warre *v.* Miller, 4 B. & C. 538; Pratt *v.* Ashley, 1 Exch. 257; s. c. 16 M. & W. 471; Hunter *v.* Leathley, 10 B. & C. 858; s. c. 5 M. & P. 457.

patch to the United States. On her return-voyage, she was sunk by Gillespie, but whether with or without the knowledge of the master, did not appear. The plaintiff insisted at the trial, that as barratry had been committed at Port au Prince, *the subsequent loss, however occasioned, was *169] to be ascribed to that cause, and he was entitled to recover. But the court directed the jury, that, admitting the act at Port au Prince to be barratry, the plaintiff could not recover on account of it, unless the jury should be of opinion, that it produced the loss. Under this direction, to which the plaintiff excepted, the jury found a verdict for the defendants.

February 12th. *Harper*, for the plaintiff, argued, that the loss, though not immediately consequent upon the act of barratry, was a ground of recovery; the assured ought to be protected against the incidental consequences of that act; and could not else have the benefit of his contract of indemnity. In the case of *Vallejo* v. *Wheeler*, Cowp. 143, the smuggling which was the barratrous act, was not the immediate and direct cause of the loss: yet the insured recovered, because the loss was sustained in consequence of the alteration of the voyage. Sergeant Marshall deduces from that case this corrolary, that if barratry be once committed, every subsequent loss or damage may be ascribed to that cause; and the underwriters are liable for it as for a loss by a barratry. Marsh. on Ins. 528, 531.

Winder, contrà, contended, that it did not appear that the act of the master at Port au Prince was barratrous, or anything more than gross neglect, or that he had any interest in the consequences of his supposed misconduct. The case of *Vallejo* v. *Wheeler* *does not support the inference *170] of Marshall, and his opinion is not authority, any further than it is borne out by the case. It has been doubted by the most enlightened jurists, whether barratry ought to be the subject of insurance, and certainly, it ought not to be extended beyond its direct and immediate consequences.

February 18th, 1818. MARSHALL, Ch. J., delivered the opinion of the court, and after stating the facts, proceeded as follows:—The general principle unquestionably is, that to entitle the plaintiff to recover, the loss must be occasioned by one of the perils in the policy; this is equally the rule of reason and the rule of law. But the plaintiff contends that the case of *Vallejo* v. *Wheeler* denies the application of this principle to a loss, in a case in which barratry has been committed. This court is not of that opinion. The case of *Vallejo* v. *Wheeler* declares it to be immaterial, whether the loss occurred during the continuance of the barratry, or afterwards, not whether the loss was produced by the barratry. In that case, the court was of opinion that the loss was produced by the barratry.

Judgment affirmed.(*a*)

(*a*) The cases on the subject of barratry are collected in Condy's edition of Marshall on Insurance, vol. 2, p. 515 *et seq*, and note 84, p. 534. To which add the following: Where the owner of a vessel chartered her to the master, for a certain period of time, the master covenanting to *victual and man her at his own expense, he was held *171] to be owner *pro hâc vice*, and no act of his would amount to barratry. And if he committed an act, which, were he invested with no other character than that of

master, could be barratrous, the insurer would not be liable, even to an innocent owner of the goods laden on board the vessel. Hallett *v.* Columbian Ins. Co., 8 Johns. 272. Barratry may be committed by the master, in respect of the cargo, although the owner of the cargo is, at the same time, owner of the ship, and although the owner is, also, supercargo, or consignee for the voyage. Cook *v.* Commercial Ins. Co., 11 Johns. 40. *Quære?* Whether information or facts, known to the assured, as to the carelessness, extravagance and want of economy in the master, be material, and ought to be disclosed to the insurer at the time of effecting the policy? Walden *v.* Firemens' Ins. Co., 12 Johns. 128, 513. A vessel was insured, among other risks, against fire; during the voyage, a seaman of the crew carelessly put up a lighted candle in the binnacle, which took fire, and communicating to some powder, the vessel was blown up and wholly lost; it was held, that the insurers were not liable for the loss. A loss occasioned by the mere negligence or carelessness of the master or mariners, does not amount to barratry, which is an act done with a fraudulent intent, or *ex maleficio.* Grim *v.* United Ins. Co., 13 Johns. 451. See 8 Mass. 308. A sentence condemning, as enemy's property, a cargo which the master had barratrously carried into an enemy's blockaded port, although conclusive evidence that the cargo was enemy's property, at the time of capture and condemnation, does not disprove an averment that the cargo was lost by the master's barratrously carrying it to places unknown, whereby the goods became liable to confiscation, and were confiscated. Goldschmidt *v.* Whitmore, 3 Taunt. 508. Where the plaintiff declared on a policy from Jutland to Leith, and averred a loss by seizure; the master testified, that the ship was pursuing her course for Leith, when she was captured by a Swedish frigate, five German miles off the coast of Norway. The *defendant produced a Swedish sentence of condemnation, for breaking the blockade of Norway: *Held*, that this was conclusive evidence [*172 of the breach of blockade, but that it was not sufficient evidence to fix the master with barratry. That cannot be done, unless he act criminally; and to say, that he broke the blockade, in disobedience to the instructions of his owners, from some private interest of his own, was too strong an inference from the evidence as it stood. The ship might have been bound for Leith, and yet might have received instructions to touch at Norway; and for other reasons, she might have gone thither, without any imputation of barratry. But the court did not decide, whether the plaintiff could have recovered, without a count for barratry, nor whether, upon a count for barratry, the sentence for a breach of blockade would be conclusive. Everth *v.* Hannam, 2 Marsh. 72; s. c. 6 Taunt. 375. Improper treatment of the vessel by the master, will not constitute barratry, although it tend to the destruction of the vessel, unless it be shown that he acted against his own judgment. Todd *v.* Ritchie, 1 Stark. 240.[1]

[1] If the act of the master were intended to benefit the owner, though mistaken and illegal, it cannot amount to barratry. Dederer *v.* Delaware Ins. Co., 2 W. N. C., 61. So, the negligence or carelessness of a competent master, does not amount to barratry. Sturm *v.* Atlantic Mutual Ins. Co., 63 N. Y. 77; s. c. 6 J. & Sp. 281. As the negligence of the master and crew, in failing to extinguish a fire. Patapsco Ins. Co. *v.* Coulter, 3 Pet. 222. See Burk *v.* Royal Exchange Assurance Co., 2 B. & Ald. 73; Bishop *v.* Pentland, 7 B. & C. 214; Grill *v.* General Iron Screw Collier Co., 1 L. R., C. P., 600; Atkinson *v.* Great Western Ins. Co. 65 N. Y. 531.

DUGAN *et al.*, Executors of CLARKE, *v.* UNITED STATES.

Bills of exchange.

Where a bill of exchange was indorsed to T. T. T., treasurer of the United States, who received it, in that capacity, and for account of the United States, and the bill had been purchased by the secretary of the treasury (as one of the commissioners of the sinking-fund, and as agent of that board), with the money of the United States, and was afterwards indorsed by T. T. T., *173] treasurer of the United States, to W. & S., and by them presented to the drawees for acceptance, and protested for non-acceptance and non-payment, and sent back by W. & S., to the secretary of the treasury: *held*, that the indorsement to T. T. T. passed such an interest to the United States, as enabled them to maintain an action on the bill, against the first indorser.

Quære? Whether, when a bill is indorsed to an agent, for the use of his principal, an action on the bill can be maintained by the principal, in his own name?

However this may be, between private parties, the United States ought to be permitted to sue in their own name, whenever it appears, not only on the face of the instrument, but from all the evidence, that they alone are interested in the subject-matter of the controversy.[1]

Held, that United States might recover in the present action, without producing from W. & S., a receipt or a re-indorsement of the bill; that W. and S. were to be presumed to have acted as the agents or bankers of the United States; and that all the interest which W. & S. ever had in the bill, was divested by the act of returning it to the party from whom it was received.

If a person, who indorses a bill to another, whether for value, or for the purpose of collection, comes again to the possession thereof, he is to be regarded, unless the contrary appears in evidence, as the *bonâ fide* holder and proprietor of such bill, and is entitled to recover thereon, notwithstanding, there may be on it one or more indorsements in full, subsequent to the indorsement to him, without producing any receipt or indorsement back to him, from either of such indorsees, whose names he may strike from the bill or not, as he thinks proper.[2]

ERROR to the Circuit Court for the district of Maryland. By the special verdict in this cause, it appeared, that on he 22d of December 1801, Aquila Brown, at Baltimore, drew a bill of exchange on Messrs. Van Staphorst & Co., at Amsterdam, for 60,000 guilders, payable at 60 days sight, to the *174] order of James Clarke, the defendants' testator. James Clarke indorsed *the bill to Messrs. Brown & Hackman, who afterwards indorsed it to Beale Owings, who indorsed the same to Thomas T. Tucker, Esq., treasurer of the United States, or order, and delivered it to him, as treasurer as aforesaid, who received it, in that capacity, and on account of the United States.

It further appeared, that this bill had been purchased with money belonging to the United States, and under the order, and by an agent of the then secretary of the treasury of the United States, for the purpose of remitting the same to Europe, for the government of the United States, who, in ordering the purchase of this bill, acted as one of the commissioners of the sinking-fund, and as agent for that board. The bill was afterwards indorsed to Messrs. Wilhelm & Jan Willink, and N. J. & R. Van Staphorst, by Thomas Tucker, treasurer of the United States, and appears by an indorsement thereon, to have been registered by the proper officer, at the treasury of the United States, on the 28th of December 1801, before it was sent to Europe. The bill having been regularly presented for acceptance, by the last in-

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[1] United States *v.* Barker, 1 Paine 156; United States *v.* Boice, 2 McLean 352.

[2] Picquet *v.* Curtis, 1 Sumn. 478; United States *v.* Barker, 1 Paine 156; Cassel *v.* Dows, 1 Bl. C. C. 335; Lonsdale *v.* Brown, 3 W. C. C. 404; Cox *v.* Simms, 1 Cr. C. C. 238.

dorsees, to the drawees, was protested for non-acceptance. It was afterwards protested for non-payment, and then returned by them to the secretary of the treasury of the United States, for and on their behalf, who directed this action to be brought. Of these protests, due notice was given to the drawer of the bill.

On this state of facts, the circuit court rendered judgment for the United States, to reverse which, this writ of error was brought.

* *Winder* and *D. B. Ogden*, for the plaintiffs in error, argued: [*175
1. That the finding of the jury that Tucker indorsed the bill to Messrs. Willinks and Van Staphorst, which indorsement was filled up at the time by Tucker, and so remained at the trial and judgment below, showed the legal title to this bill out of the United States, and defeated their right to maintain the action. The transfer to the last indorsees being in full, a recovery could not be had, in the name of the United States, without producing from the indorsees a receipt or re-indorsement of the bill; and the indorsement, not being in blank, could not be stricken out, at the trial, so that the court and jury were bound to believe that that the title was not in the United States, but in the persons to whom Tucker had indorsed the bill. If a bill be indorsed in blank, and the indorsee fills up the blank indorsement, making it payable to himself, the action cannot be brought in the name of the indorser, which, otherwise, it might (Chitty on Bills 148, Am. ed. of 1807). Every indorsement, subsequent to that to the holder or plaintiff, must be stricken out of the bill, before or at the trial, in order to render the evidence correspondent to the declaration (Ibid. 378). Value received is implied in every act of indorsement, and a transfer by indorsement or delivery, vests in the assignee a right of action on the bill, against all the preceding parties to it. An indorser, having paid a bill, must, when he sues the acceptor, drawer or preceding indorser, prove that it was returned to him, and he paid it. *Mendez* v. *Cameron*, 1 Ld. Raym. 742. *The [*176
special verdict does not find that the indorsement to Willinks, &c., was as agents; but that, by the indorsement, the contents of the bill were directed to be paid to them. The finding that the bill was afterwards returned by them to the secretary of the treasury of the United States, for and on behalf of the United States, is not finding that they were agents; nor can the court infer it: and if they did, still, the outstanding indorsement shows the legal title in the last indorsee. It has been determined by the court, that the mere possession of a promissory note, by an indorsee, who had indorsed it to another, is not sufficient evidence of his right of action against his indorser, without a re-assignment or receipt from the last indorsee. *Welch* v. *Lindo*, 7 Cr. 159.

2. The United States cannot be the indorsees of a bill, so as to entitle them to bring an action on it in their own name. It is essential to a bill of exchange, that it should be negotiable. The government of the United States, as such, are incapable of indorsing a bill; of receiving and giving notice of non-acceptance and non-payment. It is essential to the very nature of this species of instruments, that all the parties should be compelled to respond, according to the several liabilities they may contract in the course of the negotiation. But the United States cannot be sued, and consequently, cannot be made answerable as the drawers or indorsers of a bill. The

national legislature is, probably, competent to provide for the case, and to
*177] designate some public officer who shall be authorized to negotiate *bills for the United States. But until some statutory provision on the subject is made, the existence of such an authority in any particular officer of the government cannot be inferred.

3. But even supposing that any indorsement whatever can vest the legal title to a bill of exchange in the United States, so as to render them capable of maintaining an action on it, in their own name, the indorsement to Tucker, under the circumstances of this case, did not vest such a title in them. The treasurer of the United States has no authority, *ex officio*, to draw, or indorse, or otherwise negotiate bills. The only officers of the government who possess the power of drawing bills are the commissioners of the sinking fund; to them it is expressly given by law. But a power to draw or indorse bills, as an agent, cannot be delegated to another, unless the power of substitution be expressly given. Chitty on Bills 39, Am. ed. 1817. Besides, the agent constituted by the commissioners was the secretary of the treasury, who employed, not Tucker, but another person, to purchase the bill. Where a bill is payable to A., for the use of B., the latter has only an equitable, not a legal, interest. The right of assignment is in the former only. Ibid. 139; *Price* v. *Stephens*, 3 Mass. 225. Here, the action ought to have been brought in the name of the trustee, and not of the *cestui que trust*.

The *Attorney-General*, contrà, contended, that the position on the other side as to agency in the negotiation of bills was not law. An action could
*178] not be *maintained in the name of Tucker, for want of interest in him. According to the doctrine on the other side, he alone is suable, as well as empowered to sue. But all the authorities show, that an agent contracting on the behalf of government, is not personally liable (*Macbeath* v. *Haldimand*, 1 T. R. 172; *Unwin* v. *Wolseley*, Ibid. 674; *Myrtle* v. *Beaver*, 1 East 135; *Rice* v. *Chute*, Ibid. 579; *Hodgson* v. *Dexter*, 1 Cranch 363; *Jones* v. *Le Tombe*, 3 Dall. 384; *Brown* v. *Austin*, 1 Mass. 208; *Sheffield* v. *Watson*, 3 Caines 69; *Freeman* v. *Otis*, 9 Mass. 272); and the other alternative of the proposition, that he is personally capable of maintaining an action, cannot be supported. A person may become a party to a bill, not only by his own immediate act, but by procuration—by the act of his attorney or agent: and all persons may be agents, for this purpose, whether capable of contracting on their own account, so as to bind themselves or not. Chitty on Bills 34 (Am. ed. of 1817). An agent of the government, who draws or indorses a bill, will not be personally bound, even if he draws or indorses in his own name, without stating that he acts as agent. (Ibid. 40.) But here, Tucker subscribed the style of his office. It is sufficient to declare on a bill of exchange, according to the legal intendment and effect, and an averment that the indorsement was to the party interested, is satisfied by showing an indorsement to his agent. (Ibid. 365, 367, App'x, 528, 539.) The United States, though not natural persons engaged in commerce, may be parties to a bill of exchange. The United States are a body politic and
*179] corporate; and it has *long since ceased to be necessary, in a declaration on a bill of exchange, to state the custom of merchants, and that the parties to it were persons within the custom. Consequently, they have

the same right to sue on a bill as any other persons; and that they are not reciprocally liable to be sued, is an attribute of sovereignty. Individuals contracting with them rely on their dignity and justice. But the power of suing on their part is essential to the collection of the public revenue, to the support of government, and to the payment of the public debts.

February 19th, 1818. LIVINGSTON, Justice, delivered the opinion of the court, and after stating the facts, proceeded as follows:—The first question which will be disposed of, although not the first in the order of argument, will be, whether the indorsement of this bill to Mr. Tucker, under the peculiar circumstances attending the transaction, did not pass such an interest to the United States, as to enable them to sue in their own name. In deciding this point, it will be taken for granted, that no doubt can arise on the special verdict, as to the party really interested in this bill. It was purchased with the money of the United States; it was indorsed to their treasurer; it was registered at their treasury; it was forwarded by their secretary of the treasury, to whom it was returned, after it had been dishonored, for and on behalf, as the jury expressly find, of the United States. Indeed, without denying the bill to be the property of the United *States, it is supposed that the action should have been in the name of Mr. Tucker, their treasurer, and not in the name of the *cestui que trust*. If it be admitted, as it must be, that a party may, in some cases, declare according to the legal intendment of an instrument, it is not easy to conceive a case, where such intendment can be stronger, than in the case before the court. [*180

But it is supposed, that before any such intendment can be made, it must appear, that Mr. Tucker acted under some law, and that his conduct throughout comported with his duties as therein prescribed. It is sufficient for the present purpose, that he appears to have acted in his official character, and in conjunction with other officers of the treasury. The court is not bound to presume, that he acted otherwise than according to law, or those rules which had been established by the proper departments of government, for the transaction of business of this nature. If it be generally true, that when a bill is indorsed to the agent of another, for the use of his principal, an action cannot be maintained, in the name of such principal (on which point no opinion is given), the government should form an exception to such rule, and the United States be permitted to sue in their own name, whenever it appears, not only on the face of the instrument, but from all the evidence, that they alone were interested in the subject-matter of the controversy. There is a fitness that the public, by its own officers, should conduct all actions in which it is interested, and in its own name; and the inconveniences to which individuals may be exposed in this way, if any, are light, when weighed against *those which would result from its being always forced to bring an action in the name of an agent. Not only the death or bankruptcy of an agent may create difficulties, but set-offs may be interposed against the individual who is plaintiff, unless the court will take notice of the interest of the United States; and if they can do this to prevent a set-off, which courts of law have done, why not at once permit an action to be instituted in the name of the United States? [*181

An intimation was thrown out, that the United States had no right to

sue in any case, without an act of congress for the purpose. On this point, the court entertains no doubt. In all cases of contract with the United States, they must have a right to enforce the performance of such contract, or to recover damages for their violation, by actions in their own name, unless a different mode of suit be prescribed by law, which is not pretended to be the case here. It would be strange, to deny to them a right which is secured to every citizen of the United States.

It is next said by the plaintiff in error, that if the indorsement to Mr. Tucker, as treasurer of the United States, passed such an interest to the latter, as to enable them to sue in their own name, yet such title was divested, by Mr. Tucker's indorsing the bill to the Messrs. Willinks and Van Staphorst, which indorsement appeared on the bill, at the trial, and is still on it. The argument on this point is, that the transfer to the last indorsees being in full, a recovery cannot be had, in the name of the United States, without
*182] producing from them a receipt, or a re-indorsement of *the bill, and that this indorsement, not being in blank, could not be obliterated at the trial; so that the court and jury were bound to believe, that the title to this bill was not in the United States but in the gentlemen to whom Mr. Tucker had indorsed it.

The mere returning of this bill, with the protest for non-acceptance and non-payment, by the Messrs. Willinks and Van Staphorst, to the secretary of the treasury of the United States, for their account, is presumptive evidence of the former having acted only as agents or as bankers of the United States. When that is not the case, it is not usual to send a bill back to the last indorser, but to some third person, who may give notice of its being dishonored, and apply for payment to such indorser, as well as to every other party to the bill. In the case of an agency, then, so fully established, it would be vain to expect either a receipt or a re-indorsement of the bill. The first could not be given, consistent with the truth of the fact, and the latter might well be refused by a cautious person, who had no interest whatever in the transaction. In such case, therefore, a court may well say, that all the title which the last indorsees ever had in the bill, which was a mere right to collect it for the United States, was divested by the single act of returning it to the party of whom it was received.

But if this agency in the Messrs. Willinks and Van Staphorst were not established, the opinion of the court would be the same. After an examination of
*183] *the cases on this subject (which cannot all of them be reconciled), the court is of opinion, that if any person, who indorses a bill of exchange to another, whether for value, or for the purpose of collection, shall come to the possession thereof again, he shall be regarded, unless the contrary appear in evidence, as the *bonâ fide* holder and proprietor of such bill, and shall be entitled to recover, notwithstanding there may be on it one or more indorsements in full, subsequent to the one to him, without producing any receipt or indorsement back from either of such indorsees, whose names he may strike from the bill, or not, as he may think proper.

Judgment affirmed.

Olivera *v.* Union Insurance Company.

Marine insurance.—Blockade.

A vessel within a port, blockaded after the commencement of her voyage, and prevented from proceeding on it, sustains a loss by a peril, within that clause of the policy insuring against the "arrests, restraints and detainments of kings," &c., for which the insurers are liable; and if the vessel so prevented be a neutral, having on board a neutral cargo, laden before the institution of the blockade, the restraint is unlawful.

A blockade does not, according to modern usage, extend to a neutral vessel, found in port, nor prevent her coming out with the cargo which was on board, when the blockade was instituted.

A technical total loss must continue to the time of abandonment. *Quære*, as to the application of this principle to a case, where the loss was by a restraint on a blockade, and proof made of the commencement of the blockade, but no proof that it continued to the time of the abandonment? [*184

Error to the Circuit Court for the district of Maryland. On the 29th day of December, in the year 1812, the plaintiffs, who are Spanish subjects, caused insurance to be made on the cargo of the brig, called the St. Francis de Assise, "at and from Baltimore to the Havana." Beside the other perils insured against in the policy, according to the usual *formula*, were "all unlawful arrests, restraints and detainments of all kings," &c. The cargo and brig were Spanish property, and were regularly documented as such.

The vessel sailed from Baltimore, and was detained by ice, until about the 8th day of February, in the year 1813, when, being near the mouth of the Chesapeake bay, the master of the brig discovered four frigates, which proved to be a British blockading squadron; he, however, endeavored to proceed to sea. While making this attempt, he was boarded by one of the frigates, the commander of which demanded and received the papers belonging to the vessel, and indorsed on one of them the words following: "I hereby certify, that the Bay of Chesapeake, and ports therein, are under a strict and rigorous blockade, and you must return to Baltimore, and upon no account whatever, attempt quitting or going out of the said port." The brig returned; after which the master made his protest, and gave notice to the agent of the owners, in Baltimore, who abandoned "in due and *reasonable time." The underwriters refused to pay the loss, on which this suit was brought. It appeared also, on the trial, that the [*185 vessel had taken her cargo on board, and sailed on her voyage, before the blockade was instituted.

On this testimony, the plaintiff's counsel requested the court to instruct the jury, that if they believed the matters so given to them in evidence, the plaintiffs were entitled to recover. The court refused to give this instruction, and the jury found a verdict for the defendants; the judgment on which was brought before this court, on a writ of error.

February 4th. *Harper*, for the plaintiffs, argued, that a right of abandonment accrued on the original restraint or obstruction of the voyage, by the blockade, without an actual attempt to pass. Upon reason and authority, the interposition of the blockade was a prevention of the prosecution of the voyage, and consequently, a loss within the policy. To constitute a technical total loss, which would give a right to abandon, it was not necessary that the vessel should expose herself to a physical risk, or actual manucaption. It was sufficient, that there was a moral impossibility of prosecuting the voyage. But here was an actual restraint by the *vis major*, in indorsing the

vessel's papers, and ordering her back to Baltimore, which would unquestionably justify the abandonment. The restraint was "unlawful," according to the true intent of this qualification of the usual terms of the policy; because the blockade was instituted, after the cargo was taken on board, and
*186] the vessel had a legal *right to proceed with it, notwithstanding the blockade. *The Betsey*, 1 Rob. 93; *The Vrow Judith*, Ibid. 150; *The Potsdam*, 4 Ibid. 89. The case of *Barker* v. *Blakes*, 2 East 283; s. c. 2 Marsh. on Ins. app'x, No. VIII., p. 835, supports the doctrine, that the insured may abandon upon a mere proclamation of blockade, although under the peculiar circumstances of that case, the party was held to have delayed his abandonment too long. The decisions of our own courts concur to support this doctrine. *Schmidt* v. *United Ins. Co.*, 1 Johns. 249; *Symonds* v. *The Union Ins. Co.*, 4 Dall. 417.

Jones and *Winder*, contrà, contended, that the decisions of this court laid the true foundation for the determination of the present case. The loss did not fall within the peculiar clause of the policy as to "unlawful arrests, restraints and detainments." The case of *Mc Call* v. *Marine Insurance Company*, 8 Cranch 59, determines, that the qualification "unlawful," extends to all the perils mentioned, to arrests, and restraints and detainments; and that a blockade is not an unlawful restraint. Whether egress, in the present case, was unlawful or not, is immaterial, unless the vessel had been actually detained and carried in for adjudication. The manner in which the blockade is to be enforced, is of military discretion, and a neutral vessel, with a cargo taken on board after the commencement of the blockade, may be turned back, though she may not be liable to condemnation as prize. Had
*187] the vessel been sent in *for adjudication, the captors would have been excused from costs and damages, though she might have been acquitted, and pursued her voyage; consequently, the restraint was not unlawful. This is a claim for indemnity, on account of a technical total loss, consequential on some of the perils insured against; a loss breaking up the voyage, or rendering it not worth pursuing. But there is no proof on the record, that the blockade still continued at the time of the abandonment. Besides, the voyage must be completely and entirely broken up. The authorities have settled it, that mere apprehension is no ground of abandonment; no loss, *quia timet*, is known to the law. In *Barker* v. *Blakes*, the two circumstances of capture and the supervening blockade were combined and connected together, to render the voyage not worth pursuing, and to justify the abandonment. The elementary writers have collected the cases concurring to establish the doctrine that a blockade or embargo, or any other inhibition of trade will not authorize an abandonment. 1 Marsh. on Ins. 219; Park on Ins. 221 (6th ed.).

Harper, in reply.—The case of *Mc Call* v. *Marine Insurance Company* went on the ground, that the blockade was lawful, and therefore, the assured was held not entitled to recover. But in this case, it is contended, that the blockade was unlawfully applied to a neutral vessel attempting to depart, with a cargo taken on board before the commencement of the blockade.
*188] The right of the neutral *to depart is inconsistent with the pretended right of the belligerent to prevent his egress. The supposed exemption

from costs and damages on the part of the blockading squadron, would not show that the neutral had no right to proceed, but only that his right was not so manifest and apparent as to subject the captors to costs and damages. It was unnecessary for the assured to prove that the blockade continued after the vessel was turned back. The legal presumption is, that it still continued; and it is a public, notorious, historical fact, that it did continue. In *Barker* v. *Blakes*, the court of K. B. merely state the previous detention by the capture, in order to show that the party was not in fault, in not reaching Havre, before the blockade commenced. But the main stress of the opinion tends to show, that the institution of a blockade may afford a ground of abandonment, without an actual attempt to enter the blockaded port. The cases cited by Marshall and Park, are not cases of blockade, but of municipal edicts interdicting trade with the ports of the sovereign by whom they were established.

February 19th, 1818. MARSHALL, Ch. J., delivered the opinion of the court, and after stating the facts, proceeded as follows:—On the part of the plaintiff in error, it has been contended, that the assured have sustained a technical total loss, by a peril within that clause in the policy, which insures "against all unlawful arrests, restraints and detainments of kings," &c. *He contends, 1st. That a blockade is "restraint" of a foreign [*189 power. 2d. That, on a neutral vessel, with a nautral cargo, laden before the institution of the blockade, it is "an unlawful restraint."

The question, whether a blockade is a peril insured against, is one on which the court has entertained great doubts. In considering it, the import of the several words used in the clause has been examined. It certainly is not "an arrest," nor is it "a detainment." Each of these terms implies possession of the thing, by the power which arrests or detains; and in the case of a blockade, the vessel remains in the possession of the master. But the court does not understand the clause as requiring a concurrence of the three terms, in order to constitute the peril described. They are to be taken severally; and if a blockade be a "restraint," the insured are protected against it, although it be neither an "arrest" nor detainment.

What, then, according to common understanding, is the meaning of the term "restraint?" Does it imply, that the limitation, restriction or confinement must be imposed by those who are in possession of the person or thing which is limited, restricted or confined; or is the term satisfied by a restriction, created by the application of external force? If, for example, a town be besieged, and the inhabitants confined within its walls by the besieging army, if, in attempting to come out, they are forced back, would it be inaccurate to say, that they are restrained within those limits? The court believes it would not; and if it would not, then, with equal propriety, may be *said, when a port is blockaded, that the vessels within are con- [*190 fined or restrained from coming out. The blockading force is not in possession of the vessels inclosed in the harbor, but it acts upon and restrains them. It is a *vis major*, applied directly and effectually to them, which prevents them from coming out of port. This appears to the court to be, in correct language, "a restraint" of the power imposing the blockade, and when a vessel, attempting to come out, is boarded and turned back, this restraining force is practically applied to such vessel.

Although the word, as usually understood, would seem to comprehend the case, yet this meaning cannot be sustained, if, in policies, it has uniformly received a different construction. The form of this contract has been long settled; and the parties enter into it, without a particular consideration of its terms. Consequently, no received construction of those terms ought to be varied. It is, however, remarkable, that the industrious researches of the bar have not produced a single case, from the English books, in which this question has been clearly decided. In the case of *Barker* v. *Blakes*, which has been cited and relied on at the bar, one of the points made by the counsel for the underwriters was, that the abandonment was not made in time, and the court was of that opinion. Although, in this case, it may fairly be implied, from what was said by the judge, that a mere blockade is not a peril within the policy, still, this does not appear to have been considered, either at the bar or by the bench, as the direct question in the cause, nor was it expressly decided. The opinion *of the court was, that the
*191] blockade constituted a total loss, which was occasioned by the detention of the vessel; but that the abandonment was not made within reasonable time, after notice of that total loss. In forming this opinion, it had not become necessary to inquire, whether the blockade, unconnected with the detention, was, in itself, a peril against which the policy provided. The judgment of the court could not be, in the most remote degree, influenced by the result of this inquiry; and consequently, it was not made with that exactness of investigation, which would probably have been employed, had the case depended on it. It is also to be observed, that the vessel did not attempt to proceed towards the blockaded port, but lay in Bristol, when the abandonment was made. The blockading squadron, therefore, did not act directly on the vessel, nor apply to her any physical force. It is not certain, that such a circumstance might not have materially affected the case. This court, therefore, does not consider the question as positively decided in *Barker* v. *Blakes*.

The decisions of our own country would be greatly respected, were they uniform; but they are in contradiction to each other. In New York, it has been held, that a blockade *is*, and in Massachusetts, that it *is not*, a peril within the policy. The opinions of the judges of both these courts are, on every account, entitled to the highest consideration. But they oppose each other, and are not given in cases precisely similar to that now before this court. The opinion that a blockade was not a restraint, was held by the courts of Massachusetts; but was expressed by the *very eminent
*192] judge who then presided in that court, in a case where the vessel was not confined within a blockaded port, by the direct and immediate application of physical force to the vessel herself. Believing this case not to have been expressly decided, the court has inquired, how far it ought to be influenced by its analogy to principles which have been settled.

It has been determined, in England, that if the port for which a vessel sails, be shut against her, by the government of the place, it is not a peril within the policy. In *Hadkinson* v. *Robinson*, 3 Bos. & Pul. 388, a vessel bound to Naples was carried into a neighboring port, by the master, in consequence of information received at sea, that the port of Naples was shut against English vessels. In an action against the underwriters, the jury found a verdict for the defendants, and, on a motion for a new trial, the

court said, "a loss of the voyage, to warrant the insured to abandon, must be occasioned by a peril acting upon the subject-matter of the insurance, immediately, and not circuitously, as in the present case. The detention of the ship, at a neutral port, to avoid the danger of entering the port of destination, cannot create a total loss, within the policy, because it does not arise from any peril insured against." It will not be denied, that this case applies, in principle, to the case of a vessel whose voyage is broken up, by the act of the master, on hearing that his port of destination is blockaded. The peril acts directly on the vessel, not more in the one case than in the other. But if, in attempting to pass the blockading *squadron, the vessel be stopped and turned back, the force is directly applied to her, [*193 and does act directly, and not circuitously. Without contesting or admitting the reasonableness of the opinion, that the loss of the voyage, occasioned by the detention of the ship, by her master, in a neutral port, is not within the policy, it may well be denied to follow, as a corollary from it, that a vessel confined in port by a blockading squadron, and actually prevented by that squadron from coming out, does not sustain the loss of her voyage, from the restraint of a foreign power, which is a peril insured against.

Lubbock v. *Rowcroft* (5 Esp. 50), which was decided at *nisi prius*, is, in principle, no more than the case of *Hadkinson* v. *Robinson*. Having heard that his port of destination was blockaded by, or in possession of the enemy, the master stopped in a different port, and the assured abandoned. The loss was declared to be produced by a peril, not within the policy. It is unnecessary to repeat the observations which were made on the case of *Hadkinson* v. *Robinson*.

An embargo is admitted to be a peril within the policy. But as has been already observed, the sovereign imposing the embargo is virtually in possession of the vessel, and may, therefore, be said to arrest and detain her. Yet, in fact, the vessel remains in the actual possession of the master or owner, and has the physical power to sail out and proceed on her voyage. The application of force is not more direct on a vessel stopped in port by an embargo, than on a vessel stopped in port by a blockading squadron. The danger of attempting to violate a blockade is as *great as the danger of attempting to violate an embargo. The voyage is as completely [*194 broken up in one case, as in the other, and in both, the loss is produced by the act of a sovereign power. There is as much reason for insuring against the one peril, as against the other; and if the word restraint does not necessarily imply possession of the thing by the restraining power, it must be construed to comprehend the forcible confinement of a vessel in port, and the forcible prevention of her proceeding on her voyage. If so, the blockade is, in such a case, a peril within the policy.

The next point to be decided is, the unlawfulness of this restraint. That a belligerent may lawfully blockade the port of his enemy, is admitted. But it is also admitted, that this blockade does not, according to modern usage, extend to a neutral vessel, found in port, nor prevent her coming out with the cargo, which was on board when the blockade was instituted. If, then, such a vessel be restrained from proceeding on her voyage, by the blockading squadron, the restraint is unlawful. The St. Francis de Assise was so restrained, and her case is within the policy.

It has been contended, that it was the duty of the neutral master to show

to the visiting officer of the belligerent squadron, his right of egress, by showing not only the neutral character of his vessel and cargo, but that his cargo was taken on board, before the institution of the blockade. This is admitted; and it is believed, that the bill of exceptions shows satisfactorily, that these facts were proved to the visiting officer. It is stated, that the
*195] *vessel and cargo were regularly documented; that the papers were shown, and that the cargo was put on board, and the vessel had actually sailed on her voyage, before the institution of the blockade.

There is, however, a material fact which is not stated in the bill of exceptions, with perfect clearness. The loss, in this case, is technical, and the court has decided that such loss must continue to the time of abandonment.(a) It is not necessary, that it should be known to exist, at the time of abandonment, for that is impossible; but that it should actually exist; a fact which admits of affirmative or negative proof, at the trial of the cause. Upon the application of this principle to this case, much diversity of opinion has prevailed. One judge is of opinion, that the rule, having been laid down in a case of capture, is inapplicable to a loss sustained by a blockade. Two judges are of opinion, that proof of the existence of the blockade, having been made by the plaintiff, his case is complete; and that the proof that it was raised, before the abandonment, ought to come from the other side. A fourth judge is of opinion, that connecting with the principle last mentioned, the fact stated in the bill of exceptions, that the abandonment was "in due and reasonable time," it must be taken to have been made, during the existence of the technical loss. Four judges, therefore, concur in the opinion, that the plaintiffs are entitled to recover; but as they form this opinion on different principles, nothing but the case itself is decided:
*196] that is, that a vessel within a port *blockaded after the commencement of her voyage, and prevented from proceeding on it, sustains a loss by a peril within the policy; and if the vessel, so prevented, be a neutral, having on board a neutral cargo, received before the institution of the blockade, the restraint is unlawful.

Judgment reversed.(b)

(a) See Rhinelander v. The Ins. Co. of Pennsylvania, 4 Cranch 29; Marshall v. Delaware Ins. Co., Id. 202; Alexander v. Baltimore Ins. Co., Id. 370.

(b) On the question of blockade, three things must be proved: 1st. The existence of an actual blockade; 2d. The knowledge of the party; and 3d. Some act of violation, either by going in, or by coming out, with a cargo laden after the commencement of blockade. The Betsey, 1 Rob. 93.

The government and courts of the United States have constantly maintained, "that ports, not actually blockaded by a present, adequate, stationary force, employed by the power which attacks them, shall not be considered as shut to neutral trade, in articles not contraband of war; that, though it is usual for a belligerent to give notice to neutral nations, when he intends to institute a blockade, it is possible, that he may not act upon his intention at all, or that he may execute it insufficiently, or that he may discontinue his blockade, of which it is not customary to give any notice: that consequently, the presence of the blockading force is the natural criterion by which the neutral is enabled to ascertain the existence of the blockade, at any given period, in like manner as the actual investment of a besieged place, is the evidence by which we decide, whether the siege, which may be commenced, raised, recommenced, and raised again, is continued or not; that, of course, a mere notification to a neutral minister, shall not be relied upon, as affecting with knowledge of the actual existence of the

blockade, either his government or its citizens; that a vessel, cleared or bound to a blockaded port, shall not be considered as violating, in any manner, the blockade, unless, on her approach towards such port, she shall have been previously warned not to enter it; that this view of the law, in itself *perfectly correct, is peculiarly important to nations, situated at a great distance from the belligerent parties, and [*197 therefore, incapable of obtaining other than tardy information of the actual state of their ports; that whole coasts and countries shall not be declared (for they can never be more than declared) to be in a state of blockade, and thus the right of blockade converted into the means of extinguishing the trade of neutral nations; and lastly, that every blockade shall be impartial in its operation, or, in other words, shall not open and shut for the convenience of the party that institutes it, and at the same time, repel the commerce of the rest of the world, so as to become the odious instrument of an unjust monoply, instead of a measure of honorable war." For the conduct of the government in this respect, see the documents in the Appendix to this volume, Note I. The decisions of the courts are collected it Mr. Condy's edition of Marshall on Insurance, vol. 1, p. 81, note 8. To the cases there cited, add the following: Williams *v.* Smith, 2 Caines 1; Radcliff *v.* United Insurance Company, 7 Johns. 38.

In the case of Fitzsimmons *v.* Newport Insurance Company (4 Cranch 185, 198), it was laid down by this court, that the 18th article of the treaty of 1794, between the United States and Great Britain, seems to be a correct exposition of the law of nations, and is admitted by the parties to the treaty, as between themselves, to be a correct exposition of the law, or to constitute a rule in that place of it. "Neither the law of nations, nor the treaty, admits of the condemnation of a neutral vessel, for the intention to enter a blockaded port, unconnected with any fact. Sailing for a blockaded port, knowing it to be blockaded, has been, in some English cases, construed into an attempt to enter that port, and has, therefore, been adjudged a breach of the blockade, from the departure of the vessel. Without giving any opinion on that point, it may be observed, that in such cases, the fact of sailing is coupled with the intention, and the sentence of condemnation is founded on an actual breach of blockade." *"It is [*198 impossible to read that instrument (the treaty), without perceiving a clear intention in the parties to it, that after notice of the blockade, an attempt to enter the port must be made, in order to subject the vessel to confiscation. By the language of the treaty, it would appear, that a second attempt to enter the port must be made, in order to subject the vessel to confiscation." "It is agreed," says that instrument, "that every vessel, so circumstanced" (that is, every vessel sailing for the blockaded port, without knowledge of the blockade), "may be turned away from such port or place, but she shall not be detained, nor her cargo, if not contraband, be confiscated, unless, after notice, she shall again attempt to enter."

As to violating a blockade, by coming out with a cargo, the time of shipment is very material, for although it might be hard to refuse a neutral liberty to retire with a cargo, already laden, and by that act already become neutral property; yet, after the commencement of a blockade, a neutral cannot be allowed to interpose in any way, to assist the exportation of the property of the enemy. After the commencement of the blockade, a neutral is no longer at liberty to make any purchase in that port. The Betsey, 1 Rob. 93; The Frederick Molke, Id. 72; The Neptunus, Id. 170. A neutral ship departing, can only take away a cargo *bonâ fide* purchased and delivered, before the commencement of the blockade: if she afterwards take on board a cargo, it is a violation of the blockade. The Vrouw Judith, 1 Rob. 150; The Rolla, 6 Id. 364. Where a ship was transferred from one neutral merchant to another, in a blockaded port, and sailed out in ballast, she was determined not to have violated the blockade. The Potsdam, 4 Rob. 89; The Juffrouw Maria Schroeder, Id. note *a*. But a ship which had been purchased by a neutral, of the enemy, in a blockaded port, and sailed from thence, on a voyage to the neutral country, was held liable to condemnation. The General Hamilton, 6 Rob. 61. And where the vessel was captured on a voyage to the blockaded port, in ballast, she having sailed for the purpose of bringing away goods, which had become the property of neutral merchants, before the date of the blockade,

she was held liable to condemnation. The rule of *blockade permits an egress to ships innocently in the port, before the restriction was imposed, and even with cargoes, if previously laden; but in the case of ingress, there is not the same reason for indulgence; there can be no surprise upon the parties, and therefore, nothing short of a physical necessity is admitted as an adequate excuse for making the attempt of entry. The Comet, Edw. 32. A maritime blockade is not violated, by sending goods to the blockaded port, nor by bringing them from the same, through the interior canal navigation of the country. A mere maritime blockade, effected by a force operating only at sea, can have no operation upon the interior communications of the port. The Ocean, 3 Rob. 297; The Stert, 4 Id. 65. But goods shipped in a river, having been previously sent in lighters, along the coast, from the blockaded port, and under charter-party with the ship, proceeding also from the blockaded port, in ballast, to take them on board, were held liable to confiscation. The Maria, 6 Rob. 201. The penalty for a breach of blockade is remitted, by the raising of the blockade, between the time of sailing from the port and the capture. When the blockade is raised, a veil is thrown over everything that has been done, and the vessel is no longer taken *in delicto*. The *delictum* completed at one period is, by subsequent events, entirely done away. The Lisette, 6 Rob. 387. A neutral ship, coming out of a blockaded port, in consequence of a rumor that hostilities were likely to take place between the enemy and the country to which the ship belongs, is not liable to condemnation, though laden with a cargo, where the regulations of the enemy would not permit a departure in ballast. The Drie Vrienden, 1 Dods. 269. But the danger of seizure and confiscation by the enemy, must be immediate and pressing. The mere apprehension of possible and remote danger, will not justify bringing a cargo out of a blockaded port. The Wasser Hundt, Id. 270, note.

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*200] *SHEPHERD *et al. v.* HAMPTON.

Measure of damages.

In an action by the vendee, for the breach of a contract of sale by the vendor, in not delivering the article, the measure of damages is the price of the article, at the time of the breach of the contract, and not at any subsequent period.[1]

Quære? How far this rule applies to a case, where advances of money have been made by the purchaser, under the contract?

ERROR to the District Court of Louisiana. The plaintiffs filed their petition or libel in the court below, stating, that on the 12th day of December 1814, they entered into a contract with the defendant for the purchase of 100,000 pounds weight of cotton, to be delivered by the defendant to the plaintiffs, on or before the 15th day of February ensuing the date of said contract, the said cotton to be of prime quality, and in good order, and for which the plaintiffs stipulated to pay at the rate of ten cents per French pound; and in case the price of cotton, at the time of delivery, should exceed the above limited price, then the petitioners were to allow the common market price on 50,000 pounds of said cotton: and alleging a breach of the agreement on the part of the defendant in not delivering the cotton, &c.

The case agreed, stated the contract as set forth in the petition, and that 49,108 pounds of cotton were delivered by the defendant, under the con-
*201] tract, about the time mentioned therein, to wit, on the 15th day *of February 1815, when the highest market price of cotton at New Orleans was 12 cents per pound; that the defendant refused to deliver the

[1] Blydenburgh *v.* Welsh, Bald. 331; Halsey *v.* Hind, 6 McLean 102; Clarke *v.* Pinney, 5 Cow. 681; Dey *v.* Dix, 9 Wend. 129; McKnight *v.* Dunlop, 5 N. Y. 537; Edgar *v.* Boies, 11 S. & R. 445; Smethhurst *v.* Woolston, 5 W. & S. 106.

remaining 50,892 pounds of cotton; that for some days after the said 15th day of February 1815, the price of cotton remained stationary at about 12 cents; that it then began to rise, and continued gradually to rise, until the commencement of this suit, when the market price was 30 cents per pound, and that the plaintiffs frequently called upon and demanded of the defendant the execution of said contract, between the said 15th day of February 1815, and the time of bringing the present suit, and were ready and offered to comply with all the stipulations on their part, which was refused by the defendant.

Upon this state of the case, the defendant contended, that the rule of damages for the breach of the contract must be the market price of cotton, on the day the contract ought to have been executed. The plaintiffs contended, that they were entitled to the difference between the price stipulated, and the highest market price up to the rendition of the judgment.

It was agreed, that if the court should be of opinion, that the law is with the defendant, then judgment should be entered for the plaintiffs for the sum of $100 damages; but if the court should be of opinion, that the law was with the plaintiffs, then judgment should be entered for the plaintiffs, for the difference between ten cents, the stipulated price, and thirty cents per pound, the present market price on the said *50,892 pounds of [*202
cotton, amounting to $10,178.40.

The cause was heard, according to the practice in the state of Louisiana, by the court below, on the case agreed, neither party demanding a jury.(a)

(a) Louisiana, being a French colony, was originally governed by the custom of Paris, and such royal ordinances as were applicable. In August 1769, when Louisiana passed under the dominion of Spain, the Spanish governor, O'Reilly, published a collection, or rather, an abstract of the administrative regulations adopted in the Spanish colonies, and a few leading principles contained in the Spanish laws, referring for further elucidations to the text in the Partidas, the Recopolacion of the Indies, &c., but at the same time, retaining in full force, until further orders (which have never been given), the French laws, such as they were, at the time Spain took possession of the country. In the meantime, the administration of justice being chiefly in the hands of Frenchmen (except in the city of New Orleans), they continued to be governed altogether by the French laws, save only in cases where the few rules contained *verbatim* in O'Reilly's ordinance, positively applied. Things remained in this situation, until the government of the United States took possession of the province, in 1803, when the increasing commerce of New Orleans brought into action the whole body of the Spanish laws, and especially the laws of Toro, and the ordinance of Bilboa, which last is regarded as the text law in commercial matters. Everything in the ancient laws, repugnant to the constitution of the United States, was taken away, and all other subsisting laws were confirmed, by the act of congress of the 26th of March 1804, ch. 391; which also gave the right of trial by jury, in all criminal cases of a capital nature, and in all civil and criminal cases, if required by either of the parties. In 1808, the civil code was adopted, which is principally a transcript of the Code Napoleon, or civil code of France. Where that is silent, its omissions are supplied by a resort to principles derived from the Roman law, and the codes founded on it, including the laws of Spain, France, and the commentaries upon them. The works of elementary writers, and the English and American reporters are cited in the courts, not as binding authority, but as the opinions of learned men, entitled to respect and attention. A regular series of reports of the decisions of the supreme court of the state is published by Mr. Martin, one of the judges. A civil suit is commenced by a petition or libel setting forth briefly the nature of the demand, to which the defendant answers; and the cause

Whereupon, *after argument, judgment was entered up for the plaintiff for the sum of $100 damages, with costs, and the cause was brought by writ of error to this court.

February 16th. *Winder*, for the plaintiffs, contended, that they were entitled to recover the difference between the stipulated price of the cotton and the highest market price, at any time after the contract was made, up to the rendition of the judgment; citing *Bussey* v. *Donaldson*, 4 Dall. 306; *Douglas* v. *McAllister*, 9 Cranch 298; *Nelson* v. *Morgan*, 2 New Orleans T. R. 256; *Cortelyou* v. *Lansing*, 2 Caines Cas. 215; *Shepherd* v. *Johnson*, 2 East 211; *Fisher* v. *Prince*, 3 Burr. 1363; *Whitten* v. *Fuller*, 2 W. Bl. 902.

No counsel appeared to argue the cause on the other side.

*204] *February 19th, 1818. MARSHALL, Ch. J., delivered the opinion of the court.—The only question is, whether the price of the article, at the time of the breach of the contract, or at any subsequent time, before suit brought, constitutes the proper rule of damages in this case. The unanimous opinion of the court is, that the price of the article, at the time it was to be delivered, is the measure of damages. For myself only, I can say, that I should not think the rule would apply to a case where advances of money had been made by the purchaser, under the contract; but I am not aware, what would be the opinion of the court, in such a case.

Judgment affirmed.

PATTON *v.* NICHOLSON.

Illegal contract.

One citizen of the United States has no right to purchase of, or sell to, another, a license or pass from the public enemy, to be used or board an American vessel.[1]

ERROR to the Circuit Court of the district of Columbia for the county of Alexandria. The plaintiff in error declared in *assumpsit*, for that the

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is set down for hearing, without any special or dilatory pleadings. The trial is by jury, only when required by either of the parties.

[1] A contract founded upon a transaction which is either *malum prohibitum*, or *malum in se*, cannot be enforced by an action of any kind. Everman *v.* Reitzel, 1 W. & S. 181; Rhodes *v.* Sparks, 6 Penn. St. 473. As, a contract founded upon a furnishing of aid to the public enemy. Clements *v.* Yturria, 14 How. 151. A contract founded upon a consideration, in violation of the navigation laws. Maybin *v.* Coulon, 4 Dall. 298; s. c. 4 Yeates 24. A contract made with a public enemy, during a state of war. Phillips *v.* Nutch, 1 Dill. 571. For the price of smuggled goods. Condon *v.* Walker, 1 Yeates 483. For the wages of a marker at an illicit billiard-table. Badgley *v.* Beale, 3 Watts 263. For the services of an engineer on board an unlicensed steamboat. The Pioneer, 1 Deady 72; The Maria, Id. 89. Or a note, the consideration of which is a gambling transaction in stocks. Fariera *v.* Gabell, 89 Penn. St. 89. The test, whether a demand connected with an illegal transaction can be enforced at law, is, whether the plaintiff requires the aid of the illegal transaction to establish his case. Swan *v.* Scott, 11 S. & R. 155; Hipple *v.* Rice, 28 Penn. St. 406; Barker *v.* Hoff, 7 Hun 284. And though an illegal contract will not be enforced, yet, if executed, the court will not inquire into the consideration. Planters' Bank *v.* Union Bank, 16 Wall. 483. S. P. Town of Verona *v.* Peckham, 66 Barb. 103; Smith *v.* Rowley, Id. 502; Woodworth *v.* Bennett, 43 N. Y. 273.

defendant, &c., was indebted to the plaintiff in the sum of $750, for a certain document or paper *called a Sawyer's License, by the plaintiff, [*205
&c., sold and delivered to the defendant, &c., and being so indebted, the defendant, &c., afterwards, &c., promised, &c. Plea, *non assumpsit.*

Evidence was offered to the jury, to show that both parties were citizens of the United States, and that the license in question was sold by the plaintiff to the defendant, in Alexandria, to be used for the protection of the schooner Brothers, an American vessel, during the late war, against enemy's vessels, on a voyage from Alexandria to St. Bartholomews, to be cleared out for Porto Rico. The license was as follows:

"Copy of a letter from his excellency H. Sawyer, his Britannic majesty's vice-admiral on the Halifax station, to his excellency the Chevalier de Onis, his Catholic majesty's envoy extraordinary and minister plenipotentiary near the United States of America.

"His Majesty's ship Centurion, at Halifax, the 10th of August 1812.

"Excellent Sir:—I have the honor to acknowledge the receipt of your excellency's letter of the 26th ultimo, and have fully considered the subject of it, as being of the greatest importance to the best interests of Great Britain, and those of his Catholic majesty, Ferdinand VII., and his faithful subjects; and in reply, I have great satisfaction in informing your excellency, that I will give directions to the commanders of his majesty's squadron on this station, not to molest American *vessels, or others under [*206
neutral flags, unarmed and laden with flour and other dry provisions, *bonâ fide*, bound to Portuguese and Spanish ports, whose papers shall be accompanied with a certified copy of this letter, from your excellency, with your seal affixed or imprinted thereon, which I doubt not will be respected by all. I beg leave to assure your excellency of the high consideration with which I have the honor to be, your excellency's most obedient humble servant, (Signed) H. Sawyer, Vice-admiral.

"His excellency, Don Luis de Onis Gonzalez Lopez y Vara, his Catholic majesty's envoy extraordinary and minister plenipotentiary to the United States, &c., Philadelphia."

The court below, upon this evidence, charged the jury, that on the evidence so offered, if believed by the jury, they ought to find a verdict for the defendant. To which charge, the plaintiff excepted. A verdict was taken, and judgment rendered for the defendant; whereupon, the cause was brought to this court by writ of error.

February 19th, 1818. *Swann*, for the plaintiff, cited *Coolidge* v. *Inglee*, 13 Mass. 26, to show that an action might be maintained upon the sale of such a license.

Lee, on the other side, was stopped by the court.

*Marshall, Ch. J., delivered the opinion of the court, that the [*207
use of a license or pass from the enemy, by a citizen, being unlawful, one citizen had no right to purchase of, or sell to, another, such a license or pass, to be used on board an American vessel.

Judgment affirmed.(a)

(a) In the several cases, during the late war, of The Julia, 8 Cranch 181; The

Aurora, Id. 203; The Hiram, Id. 444; s. c. 1 Wheat. 440, and The Ariadne, 2 Id. 143, the court determined, that the use of a license or passport of protection from the enemy, constitutes an act of illegality, which subjects the property sailing under it, to confiscation, in the prize court. The act of the 2d of August 1813, ch. 585, and of the 6th of July 1812, ch. 452, § 7, prohibiting the use of licenses or passes granted by the authority of the government of the United Kingdom of Great Britain and Ireland, repealed by the act of 3d of March 1815, ch. 766, were merely cumulative upon the pre-existing law of war. It follows, as a corollary from this principle, that a contract for the purchase or sale of such license is void, as being founded on an illegal consideration. That no contract whatever, founded upon such a consideration, can be enforced in a court of justice, is a doctrine familiar to our jurisprudence, and was also the rule of the civil law. It is upon the same principle, that every contract, whether of sale, insurance or partnership, &c., growing out of a commercial intercourse or trading with the enemy, is void. Thus, it has been held by the supreme court of New York, that a partnership between persons, residing in two different countries, for commercial purposes, is, at least suspended, if not *ipso facto* determined, by the breaking out of war between those countries; and that if such partnership expire, by its own limitation, during the war, the existence of the war dispenses with the necessity of giving public notice of the dissolution. *Griswold *v.* Waddington, 15 Johns. 57.

*208] It is, perhaps, almost superfluous to add, that the use of a license from the government of the country itself, to which the person using it belongs, is lawful; and consequently, any contract between the citizens or subjects of that country, respecting such license, is also lawful. Thus, by the act of the 6th of July 1812, ch. 452, § 6, the president was authorized to give, at any time within six months after the passage of the act, passports for the safe protection of any ship or other property belonging to British subjects, and which was then within the limits of the United States. And such licenses are by no means, as has been commonly supposed, an invention of the present time. For Valin, speaking of the frauds by which the commerce and property of the enemy were screened from capture, during the war in which France and England were allied against Holland and Spain, not only on the high seas, but even in the ports of France, remarks, that previous to the ordinance on which he was commenting, no other means of counteracting these frauds had been discovered, than that of delivering passports to the vessels of the enemy, permitting them to trade with the ports of the kingdom, upon the payment of a duty of a crown per ton, which was done by an edict of 1673. Valin, Sur l'Ord.

But in order to protect a citizen in the use of a license from his own government to trade with the enemy, it is indispensably necessary, that he should conform to the terms and conditions under which it is granted; otherwise, the trading, and all contracts arising out of it, will be illegal. See the cases collected in Chitty's Law of Nations, ch. 8. To which add the following: The Byfield, Edw. 188; The Goede Hoop, Id. 327; The Catharina Maria, Id. 337; The Carl, Id. 339; The Europa, Id. 342; The Speculation, Id. 343; The Cousine Mariane, Id. 346; The Vrou Cornelia, Id. 349; The Johan Pieter, Id. 354; The Jonge Frederick, Id. 357; The Europa, Id. 358; The Cornelia, Id. 359; The Sarah Maria, Id. 361; The Henrietta, Id. 363; The Nicoline, Id. 364; The Wolfarth, Id. 365; The Emma, Id. 366; The Frau Magdalena, Id. 367;

*209] *The Hoppet, Id. 369; The Bourse, *alias* Gute Erwagtung, Id. 370; The Jonge Clara, 371; The Minerva, Id. 275; The Saint Ivan, Id. 376; The Hector, Id. 379; The Edel Catharina, 1 Dods. 55; The Vrow Deborah, Id. 160; The Henrietta, Id. 168; The Bennet, Id. 175; The Dankerbarheit, Id. 183; The Seyerstadt, Id. 241; The Manly, Id. 257; The Æolus, Id. 300; The Wohlforth, Id. 305; The Louise Charlotte de Guldeneroni, Id. 308; The Freundschaft, Id. 316; Feise *v.* Thompson, 1 Taunt. 121; Feise *v.* Waters, 2 Id. 249; Miller *v.* Gernon, 3 Id. 394; Fayle *v.* Bourdilla, Id. 546; Morgan *v.* Oswald, Id. 554; Feise *v.* Bell, 4 Id. 4; De Fastet *v.* Taylor, Id. 233; Le Cheminant *v.* Pearson, Id. 367; Freeland *v.* Walker, Id. 478; Waring *v.* Scott, Id. 605; Siffkin *v.* Glover, Id. 717; Effurth *v.* Smith, 5 Id. 329; Flindt *v.* Scott, Id. 674; Schnakoneg *v.* Andren, Id. 716; Robertson *v.* Morris, Id. 720; Staniforth *v.*

Sonlha, Id. 626; Siffken *v.* Allnut, 1 M. & S., 39; Robinson *v.* Touray, Id. 217; Hagedorn *v.* Reid, Id. 567; Hagedorn *v.* Bazett, 2 Id. 100; Hullman *v.* Whitmore, 3 Id. 337; Gibson v. Mair, 1 Marsh. 39; Gibson *v.* Service, Id. 119; Darby *v.* Newton, 2 Id. 252.

Such licenses, when issued to the citizens or subjects of the state only, in order to legalize a limited commercial intercourse with the enemy, which is tolerated from political motives, of which every government is the exclusive judge, have nothing in them contrary to the law of nations. But when granted to neutrals, in order to enable them to carry on a trade, which they have a right to pursue, independently of the license, or to the subjects of the belligerent state, in order to enable them to carry on a trade, which is forbidden to neutrals, under the pretext of a proclamation of blockade, they are manifestly an abuse of power, and a violation of the law of nations. In both these cases, they would subject the property to capture, and to condemnation, in the prize courts of the other belligerent, and if issued to the subjects of that belligerent, by *the enemy, would also render it liable to confiscation, as being a breach of their allegiance. [*210

The licenses granted by the officers of the British government, &c., during the late war, to American vessels, have been pronounced by this court, to subject the property sailing under them to confiscation, when captured by American cruisers; and it has been decided, to be immaterial, whether the licenses would or would not have saved the property from confiscation in the British prize courts (8 Cranch 200); but it has been made a question in those courts. how far these documents could protect against British capture, on account of the nature and extent of the authority of the persons by whom they were issued. The leading case on this subject is that of The Hope (1 Dods. 226), which was that of an American ship, laden with corn and flour, captured whilst proceeding from the United States, to the ports of Spain and Portugal, and claimed as protected by an instrument on board, granted by Allen, the British consul at Boston, accompanied by a certified copy of a letter from Admiral Sawyer, the British commander on the Halifax station. In pronouncing judgment in this case, Sir W. Scott observed, that if there was nothing further in the way of safeguard, than what was to be derived from these papers, it would certainly be impossible to hold, that the property was sufficiently protected. "The instrument of protection, in order to be effectual, must come from those who have a competent authority to grant such a protection; but these papers come from persons who are vested with no such authority. To exempt the property of enemies from the effect of hostilities, is a very high act of sovereign authority: if, at any time, delegated to persons in a subordinate station, it must be exercised either by those who have a special commission granted to them for the particular business, and who, in legal language, are termed mandatories, or by persons in whom such a power is vested, in virtue of any official situation to which it may be considered incidental. It is quite clear, that no consul, in any country, particularly in an enemy's country, is vested with any such power, in virtue of his station. *Ei rei non præponitur*, *and therefore, his acts relating to it are not binding. Neither does the admiral, on any station, possess such authority. He has, indeed, power relative to the [*211 ships under his immediate command, and can restrain them from committing acts of hostility, but he cannot go beyond that; he cannot grant a safeguard of this kind, beyond the limits of his own station. The protections, therefore, which have been set up, do not result from any power incidental to the situation of the persons by whom they were granted; and it is not pretended, that any such power was specially intrusted to them, for the particular occasion. If the instruments which have been relied upon by the claimants, are to be considered as the naked acts of these persons, then they are, in every point of view, totally invalid. But the question is, whether the British government has taken any steps to ratify and confirm these proceedings, and thus to convert them into valid acts of state; for persons not having full powers, may make what in law are termed *sponsiones*, or, in diplomatic language, treaties *sub spe rati*, to which a subsequent ratification may give validity: *ratihabitio mandato æquiparatur*." He proceeds to show, that the British government

had confirmed the acts of its officers, by the order in council, of the 26th of October 1813, and accordingly decrees restitution of the property. In the case of The Reward, before the Lords of Appeal, the principle of this judgment of Sir WILLIAM SCOTT was substantially confirmed. But in the case of The Charles, and other similar cases, certificates or passports of the same kind, signed by Admiral Sawyer, and also by Don Luis de Onis, the Spanish minister to the United States, had been used for voyages from America to certain Spanish ports in the West Indies, and the Lords held, that these documents, not being included within the terms of the confirmatory order in council, did not afford protection, and accordingly condemned the property. 1 Dods. app'x, D. In the cases of The Venus and The South Carolina, a similar question arose on the
*212] effect of passports granted by Mr. Forster, the British minister in the *United States, permitting American vessels to sail with provisions from the ports of the United States, to the island of St. Bartholomews, but not confirmed by an order in council. The Lords condemned in all the cases in which the passports were not within the terms of the orders in council, by which certain descriptions of licenses granted by Mr. Forster had been confirmed. Id.

ROBINSON *v.* CAMPBELL.

Land-law.—Conflict of laws.—Practice.—Ejectment.—Limitation.

By the compact of 1802, settling the boundary line between Virginia and Tennessee, and the laws made in pursuance thereof, it is declared, that all claims and titles to lands, derived from Virginia, or North Carolina, or Tennessee, which have fallen into the respective states, shall remain as secure to the owners thereof, as if derived from the government within whose boundary they have fallen, and shall not be prejudiced or affected by the establishment of the line. Where the titles, both of the plaintiff and defendant in ejectment, were derived under grants from Virginia, to lands which fell within the limits of Tennessee, it was held, that a prior settlement-right thereto which would, in equity, give the party a title, could not be asserted as a sufficient title, in an action of ejectment brought in the circuit court of Tennessee.

Although the state courts of Tennessee have decided, that, under their statutes declaring an elder grant, founded on a junior entry, to be void, a junior patent, founded on a prior entry, will prevail, at law, against a senior patent, found on a junior entry—this doctrine has never been extended beyond cases within the express purview of the statute of Tennessee, and cannot apply to the present case of titles deriving all their validity from the laws of Virginia, and confirmed by the compact between the two states.

The general rule is, that remedies, in respect to real property are to be pursued according to the
*213] *lex loci rei sitæ*. The acts of the two states *are to be construed as giving the same validity and effect to the titles in the disputed territory, as they had, or would have, in the state, by which they were granted, leaving the remedies to enforce such titles to be regulated by the *lex fori*.

The remedies in the courts of the United States, at common law and in equity, are to be, not according to the practice of the state courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of those principles. Consistently with this doctrine, it may be admitted, that where, by the statutes of a state, a title, which would otherwise be deemed merely equitable, is recognised as a legal title, or a title which would be valid at law, is, under circumstances of an equitable nature, declared void, the right of the parties in such case may be as fully considered in a suit at law, in the courts of the United States, as in any state court.

A conveyance by the plaintiff's lessor, during the pendency of an action of ejectment, can only operate upon his reversionary interest, and cannot extinguish the prior lease. The existence of such lease is a fiction; but it is upheld for the purposes of justice; if it expire during the pendency of a suit, the plaintiff cannot recover his term at law, without procuring it to be enlarged by the court, and can proceed only for antecedent damages.

In the above case, it was held, that the statute of limitations of Tennessee was not a good bar to the action, there being no proof that the lands in controversy were always within the original limits of Tennessee, and the statute could not begin to run, until it was ascertained by the compact of 1802, that the land fell within the jurisdictional limits of Tennessee.

Robinson v. Campbell.

ERROR to the District Court of East Tennessee. This was an action of ejectment, brought by the defendant in error (the plaintiff's lessor in the court below), against the present plaintiff, and S. Martin, on the 4th of February 1807, in the district court for the district of East Tennessee, which possessed circuit court powers. The defendants, in that court, pleaded separately, the general issue, as to 400 acres, and disclaimed all right to the residue of the tract specified *in the declaration. A verdict was given [*214 for the plaintiff, in October term 1812.

From the statement contained in the bill of exceptions, taken at the trial of the cause, it appeared, that the land for which the action was brought, was situate between two lines, run, in 1779, by Walker and Henderson, as the boundary lines of Virginia and North Carolina. The former state claimed jurisdiction to the line run by Walker, and the latter to the line run by Henderson. After the separation of Tennessee from North Carolina, the controversy between Virginia and Tennessee, as to boundary, was settled, in 1802, by running a line equidistant from the former lines. The land in dispute fell within the state of Tennessee. Both the litigant parties claimed under grants issued by the state of Virginia, the titles to lands derived from the said state having been protected by the act of Tennessee, passed in 1803, for the settlement of the boundary line.

The plaintiff rested his title on a grant (founded on a treasury-warrant) to John Jones, dated August the 1st, 1787, for 3000 acres; 1500 acres of which were conveyed to the lessor by Jones, on the 14th of April 1788: and proved possession in the defendant, when the suit was commenced.

The defendant, to support his title to the said 400 acres, offered in evidence a grant for the same to Joseph Martin, dated January 1st, 1788, founded on a settlement-right, and intermediate conveyances to himself. He also offered in evidence, that a settlement was made on said land in 1778, by William Fitzgerald, who assigned his settlement-right to the *said [*215 Joseph Martin; that a certificate, in right of settlement, was issued to Martin, by the commissioners for adjusting titles to unpatented lands; on which certificate, and on the payment of the composition money, the above grant was issued. This evidence was rejected by the court below.

The defendant also offered in evidence, a deed of conveyance, from the plaintiff's lessor to Arthur L. Campbell, dated January 2d, 1810, for the land in dispute; but the same was also rejected.

He also claimed the benefit of the statute of limitations of the state of Tennessee, on the ground, that he, and those under whom he claims, had been in continued and peaceable possession of the 400 acres, since the year 1788. The court decided that the statute did not apply.

The cause was then brought before this court by writ of error.

February 24th. *Law*, for the plaintiff in error, argued: 1. That the defendant below ought to have been permitted to give evidence showing that his grant had preference in equity over the plaintiff's grant. By the law, as settled in Tennessee, the prior settlement-right of the defendant, though an equitable title, might be set up as a sufficient title, in an action at law. The opinion of the judge below proceeds on the idea, that the Virginia practice must prevail, under which such a title could only be asserted in equity. The acts for carrying into effect the compact settling the boun-

dary, declare, that the claims and titles derived from Virginia shall not be
*216] affected or prejudiced by the change *of jurisdiction. But, are the claims and titles less secure, if the forms of legal proceedings of Tennessee be adopted? Is there any difference, whether the plaintiff's grant be vacated, on the equity side of the court, or rendered inoperative in an action of ejectment? It is admitted, that as to the nature, validity and construction of contracts, the *lex loci* must prevail; but the tribunals of one country have never carried their courtesy to other countries so far as to change the form of action, and the course of judicial proceedings, or the time within which the action must be commenced. Chitty on Bills 111, note *h* (Am. ed. of 1817), and the authorities there cited.

2. The deed from the plaintiff's lessor, pending the suit, showed an outstanding title in another, and ought to have prevented the plaintiff from recovering. 1 Cruise on Real Property 503, 537.

3. It is a universal principle, that the statute of limitations of the place where the suit is brought is to govern in determining the time within which a suit must be commenced. Chitty on Bills 111.

4. New exceptions to the operation of the statute of limitations as to real property cannot be constructively established by the courts. *McIver* v. *Ragan*, 2 Wheat. 25. The statute of limitations of Tennessee ought to be applied to suits commenced in the courts of Tennessee, for lands which were always within the jurisdiction of that state, as claimed by her, and which fell within her territory, upon the final settlement of the boundary. The title to such lands may be determinable only by the law of Virginia,
*217] *but the mode of pursuing the remedy on that title must depend upon the *lex fori*.

The *Attorney-General*, contrà, insisted, that by the compact between the two states, the law of Virginia was made the law of the titles to these lands. By the settled practice of that state, as well as the established doctrine of the common law, the legal title must prevail in a court of law. The case of real property is an exception to the general rule, as to applying the statute of limitations according to the *lex fori*, and not according to the *lex loci*. Generally speaking, suits for such property must be commenced in the courts of the country where the land lies, and consequently, both the right and the remedy are to be determined by one and the same law. But this is an anomalous case, depending upon the peculiar nature and provisions of the compact of 1802, between the two states. The statute of limitations of Tennessee could not operate upon these lands, until they were ascertained to lie in Tennessee; and the peculiar rule established by the courts of Tennessee, permitting an equitable title to be asserted in an action at law, would not apply to a controversy concerning titles wholly depending on the law of Virginia. The proceedings in ejectment are fictitious in form, but for all the purposes of substantial justice, they are considered as real. If the term expire, pending the action, the court will permit it to be enlarged, and no conveyance by the lessor of the plaintiffs, while the suit is going on, can
*218] operate to extinguish the prior lease. The court below, *therefore, committed no error, in refusing to permit the deed of conveyance from the plaintiff's lessor to be given in evidence, in order to establish the existence of an outstanding title.

Robinson v. Campbell.

February 24th, 1818. TODD, Justice, delivered the opinion of the court, and after stating the facts, proceeded as follows:—The first question is, whether the circuit court were right, in rejecting the evidence offered by the defendant, to establish a title in himself, under the grant of Joseph Martin, that grant being posterior in date to the grant under which the plaintiff claimed? and this depends upon the consideration, whether a prior settlement-right, which would, in equity, give the party a title to the land, can be asserted also, as a sufficient title, in an action of ejectment.

By the compact settling the boundary line between Virginia and Tennessee, and the laws made in pursuance thereof, it is declared, that all claims and titles to lands derived from the governments of Virginia, or North Carolina, or Tennessee, which have fallen into the respective states, shall remain as secure to the owners thereof, as if derived from the government within whose line they have fallen, and shall not be in any wise prejudiced or affected, in consequence of the establishment of the said line. The titles, both of the plaintiff and defendant in this case, were derived under grants from Virginia; and the argument is, that as, in Virginia, no equitable claims or rights, antecedent to the grants, could be asserted in a court of *law, in an ejectment, but were matters cognisable in equity only, that the rule must, under the compact between the two states, apply [*219 to all suits in the courts in Tennessee, respecting the lands included in those grants.

The general rule is, that remedies in respect to real estate are to be pursued according to the law of the place where the estate is situate.(a) Nor

(a) The foundations of this doctrine, and of all the other principles concerning the *lex loci*, are laid down by Huberus, in his *Prælectiones*, with that admirable force and precision which distinguish the works of the writers who have been formed in the school of the Roman jurisconsults, and which justify the eulogium pronounced upon that school by Leibnitz. "Fundamentum universæ hujus doctrinæ diximus esse, et tenemus, subjectionem hominum infra leges cujusque territorii, quamdiu illic agunt, quæ facit, ut actus ab initio validus aut nullus, alibi quoque valere aut non valere non nequeat. Sed hæc ratio non convenit rebus immobilibus, quando ille spectantur, non ut dependentes a libera dispositione cujusque patrisfamilias, verum quatenus certæ notæ lege cujusque Reip. ubi sita sunt, illis impressæ reperiuntur; hæ notæ manent indelibiles in ista Republ. quicquid aliarum civitatum leges aut privatorum dispositiones, secus aut contra statuant; nec enim sine magna confusione præjudicioque Reipubl. ubi sitæ sunt res soli, leges de illis latæ, dispositionibus istis mutari possent. Hinc, Frisius habens agros et demos in provincia Groningensi, non potest de illis testari, quia lege prohibitum est ibi de bonis immobilibus testari, non valente jure Frisico adficere bona, quæ partes alieni territorii integrantes constituunt. Sed an hoc non obstat ei, quod antea diximus, si factum sit testamentum jure loci validum, id effectum habere etiam in bonis alibi sitis, ubi de illis testari licet? Non obstat; quia legum diversitas in illa specie non afficit res soli, neque de illis loquitur, sed ordinat actum testandi; quo recte celebrato, lex Reipubl. non vetat illum actum valere in immobilibus, quatenus nullus character illis ipsis a lege loci impressus læditur aut imminuitur.[1] Hæc observatio locum etiam in contractibus habet: quibus in Hollandia venditæ res soli Frisici, modo in Frisia prohibito, licet, ubi gestus est, valido, recte venditæ intelliguntur; idemque in rebus non quidem immobilibus, at solo cohærentibus; uti si frumentum soli Frisici in Hollandia secundum lastas, ita dictas, sit venditum, non valet venditio, nec quidem in Hollandia secundum eam jus dicetur, etsi tale fru-

[1] *Sed quære?* See United States *v.* Crosby, 7 Cranch 115.

do the court *perceive any reason to suppose, that it was the intention of the legislatures of either state, in the acts before us, to vary the application of the rule in cases within the compact. Those acts are satisfied, by construing them to give the same validity and effect to the titles acquired in the disputed territory, as they had, or would have, in the state by which they were granted, leaving the remedies to enforce such titles to be regulated by the *lex fori*.

The question then is, whether, in the circuit courts of the United States, a merely equitable title can be set up as a defence in an action of ejectment?

*221] It is understood, that the state courts of Tennessee have *decided, that under their statutes, declaring an elder grant, founded on a younger entry, to be void, the priority of entries is examinable at law; and that a junior patent, founded on a prior entry, shall prevail in an action of ejectment, against a senior patent, founded on a junior entry. But this doctrine has never been extended beyond the cases which have been construed to be within the express purview of the statutes of Tennessee. The present case stands upon grants of Virginia, and is not within the purview of the statutes of Tennessee; the titles have all their validity from the laws of Virginia, and are confirmed by the stipulations of the compact. Assuming, therefore, that in the case of entries under the laws of Tennessee, the priority of such entries is examinable at law, this court do not think, that the doctrine applies to merely equitable rights, derived from other sources.

There is a more general view of this subject, which deserves consideration. By the laws of the United States, the circuit courts have cognisance of all suits of a civil nature, at common law and in equity, in cases which fall within the limits prescribed by those laws. By the 34th section of the judiciary act of 1789, it is provided, that the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision, in trials at common law, in the courts of the United States, in cases where they apply. The act of May 1792, confirms the modes of proceeding then used in suits at common law, in the courts of the United States, and declares,

*222] that the modes of proceeding in *suits of equity, shall be "according to the principles, rules and usages which belong to courts of equity, as contradistinguished from courts of common law," except so far as may have been provided for by the act to establish the judicial courts of the United States. It is material to consider, whether it was the intention of congress, by these provisions, to confine the courts of the United States, in their mode of administering relief, to the same remedies, and those only, with all their incidents, which existed in the courts of the respective states. In other words, whether it was their intention, to give the party relief at law, where the practice of the state courts would give it, and relief in equity only when,

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mentum ibi non sit vendi prohibitum; quia in Frisia interdictum est; et solo cohæret ejusque pars est. Nec aliud juris erit in succesionibus ab intestato; si defunctus sit paterfamilias, cujus bona in diversi locis imperii sita sunt, quantum attinet ad immobilia, servatur jus loci, in quo situs eorum est; quoad mobilia, servatur jus, quod illic loci est, ubi testator habuit domicilium, qua de re, vide Sandium, lib. 4, decis., tit. 8, def. 7." Huberus, *Prælectiones*, tom. 2, lib. 1, tit. 8, *De Conflictu Legum*. See Erskine's Institutes of the Law of Scotland (10th ed.) 809; Pothier, *de la Prescription*, 207; Code Napoleon, art. 8.

according to such practice, a plain, adequate and complete remedy could not be had at law. In some states in the Union, no court of chancery exists, to administer equitable relief. In some of those states, courts of law recognise and enforce, in suits at law, all the equitable claims and rights which a court of equity would recognise and enforce; in others, all relief is denied, and such equitable claims and rights are to be considered as mere nullities, at law. A construction, therefore, that would adopt the state practice, in all its extent, would at once extinguish, in such states, the exercise of equitable jurisdiction. The acts of congress have distinguished between remedies at common law and in equity, yet this construction would confound them. The court, therefore, think, that to effectuate the purposes of the legislature, the remedies in the courts of the United States are to be, at common law or in equity, not *according to the practice of state courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of those principles. Consistently with this construction, it may be admitted, that, where by the statutes of a state, a title, which would otherwise be deemed merely equitable, is recognised as a legal title, or a title which would be good at law, is, under circumstances of an equitable nature, declared by such statutes to be void, the rights of the parties, in such case, may be as fully considered, in a suit at law, in the courts of the United States, as they would be in any state court. In either view of this first point, the court is of opinion, that the circuit court decided right, in rejecting the evidence offered by the original defendant. It was matter proper for the cognisance of a court of equity, and not admissible in a suit at law. [*223

The next question is, whether the circuit court decided correctly, in rejecting the deed of conveyance, from the plaintiff's lessor to Arthur L. Campbell, for the land in controversy, made during the pendency of the suit? The answer that was given at the bar, is deemed decisive; although an action of ejectment is founded in fictions, yet, to certain purposes, it is considered in the same manner as if the whole proceedings were real; for all the purposes of the suit, the lease is to be deemed a real possessory title. If it expire, during the pendency of the suit, the plaintiff cannot recover his term, at law, without procuring it to be enlarged by the court, and can proceed only for antecedent damages. In the present case, the lease is to *be deemed as a good subsisting lease, and the conveyance by the plaintiff's lessor, during the pendency of the suit, could only operate upon his reversionary interest, and, consequently, could not extinguish the prior lease. The existence of such a lease is a fiction; but it is upheld, for the purposes of justice, and there is no pretence, that it works any injustice in this case. [*224

The last question is, whether the statute of limitations of Tennessee was a good bar to the action. It is admitted, that it would be a good bar, only upon the supposition, that the lands in controversy were always within the original limits of Tennessee; but there is no such proof in the cause. The compact of the states does not affirm it, and the present boundary was an amicable adjustment by that compact. It cannot, therefore, be affirmed, by any court of law, that the land was within the reach of the statute of limitations of Tennessee, until after the compact of 1802. The statute could not begin

to run, until it was ascertained, that the land was within the jurisdictional limits of the state of Tennessee. The judgment of the circuit court is affirmed, with costs.

Judgment affirmed.(*a*)

(*a*) In Buller's Nisi Prius 110, it is laid down, that in ejectment, "if the defendant prove a title out of the lessor, it is sufficient, although he have no title himself; but he ought to prove a subsisting title out of the lessor, for producing an ancient lease for 1000 years will not be sufficient, unless he likewise prove possession, under such lease, within twenty years." The same doctrine is stated in Runnington on Ejectments 343; and the case of England *v.* *Slade, 4 T. R. 682, is relied on to support it. But *225] this case only shows, that the tenant may prove that the lessor's title has expired, and therefore, that he ought not to turn him out of possession.

It is unquestionable law, that in ejectment, "the plaintiff cannot recover but upon the strength of his own title; he cannot found his claim upon the weakness of the defendant's title; for possession gives the defendant a right against every man who cannot show a good title." Haldane *v.* Harvey, 4 Burr. 2484; s. P. Martin *v.* Strachan, 5 T. R. 107, note. But this doctrine was asserted in a case where the plaintiff sought to recover, upon a title, which she had conveyed away to a third person; and nothing can be clearer, than that the plaintiff cannot recover, without showing a subsisting title in himself. If the position in Buller's Nisi Prius were confined to cases of this sort, there could not be the slightest ground to question its validity. But it is supposed to establish the doctrine, that if the plaintiff has a title, which is not an indefeasible possessory title, but is, in fact, better than that of the defendant, he is not entitled to recover, if the defendant can show a superior title in a third person, with whom the defendant does not claim any privity.

It is the purpose of this note, to show, that the authorities do not justify the doctrine to this extent; and if it be true, in any case (which may be doubted), it is liable to a great many exceptions, which destroy its general applicability. Speaking upon this subject, Lord MANSFIELD is reported to have said, "there is another distinction to be taken, whether, supposing a title superior to that of the lessor of the plaintiff exists in a third person, who might recover the possession, it lies in the mouth of the defendant to say so, in answer to an ejectment brought against himself, by a party having a better title than his own. I found this point settled, before I came into this court, that the court never suffers a mortgagor to set up the title of a third person against his mortgagee." Doe *v.* Pegge, 1 T. R. 758, note. The point, as to a mortgagee, has been long established. In Lindsey *v.* Lindsey, Bull. N. P. 110, on an ejectment by a second *mortgagee against the mortgagor, the court would not suffer the latter to give *226] in evidence the title of the first mortgagee, in bar of the second, because he was barred, by his own act, from averring that he had nothing in the land, at the time of the second mortgage. And the principle of this decision has been repeatedly recognised, both in the English and American courts. Doe *v.* Pegge, 1 T. R. 758 note; Doe *v.* Staple, 2 Id. 684; Lade *v.* Holford, 3 Burr. 1416; Newall *v.* Wright, 3 Mass. 138, 153; Jackson *v.* Dubois, 4 Johns. 216.

Indeed, the mortgagor, notwithstanding the mortgage, is now deemed seised, and the legal owner of the land, as to all persons except the mortgagee, and those claiming under him, and he may maintain an ejectment or real action upon such seisin. Hitchcock *v.* Harrington, 6 Johns. 290; Sedgwick *v.* Hollenback, 7 Id. 376; Collins *v.* Torry, Id. 278; Willington *v.* Gale, 7 Mass. 138; Porter *v.* Millet, 9 Id. 101. And upon the same principle, in an ejectment by the lessor, against his own lessee, the latter is not permitted to set up or take advantage of a defect in the lessor's title, or to show a subsisting title in a third person to defeat the lessor's right. Driver *v.* Lawrence, 2 W. Bl. 1259; 2 Salk. 447; Newall *v.* Wright, 3 Mass. 138, 153; Jackson *v.* Reynolds, 1 Caines 444; Jackson *v.* Whitford, 2 Id. 215; Jackson *v.* Vosburgh, 7 Johns. 186; Brant *v.* Livermore, 10 Id. 358. So, a person who has entered into possession under another,

and acknowledged his title, cannot set up an outstanding title in a third person. Jackson *v.* Stewart, 6 Johns. 34; Jackson *v.* De Walts, 7 Id. 157; Jackson *v.* Hinman, 10 Id. 292; Doe *v.* Clarke, 14 East 488. Nor can a person, claiming the land under the tenant, set up an outstanding title against the landlord; Jackson *v.* Graham, 3 Caines 188; nor against a purchaser under an execution against the landlord or the tenant. Jackson *v.* Graham, *ut supra;* Jackson *v.* Bush, 10 Johns. 223. And a person who has entered, by permission of one tenant in common, cannot, after a partition made, set up *an adverse title, in bar of an ejectment by the tenant in common, to whose share the premises had fallen. Smith *v.* Burtis, 9 Johns. 174; Fisher *v.* Creel, 13 Id. 116. And where a person in possession of land covenants with another, to pay him for the land, the covenantee is estopped from setting up an outstanding title, to bar an ejectment by his covenantor, unless he show fraud or imposition in the agreement. Jackson *v.* Ayres, 14 Johns. 224. Lord ELDON has declared, that with regard to mortgagors and incumbrancers, if they do not get in a term that is outstanding, but satisfied, in some sense, either by taking an assignment, making the trustee a party to the instrument, or taking possession of the deed creating the term, that term cannot be used to protect them against any person having mesne charges or incumbrances. Maundrell *v.* Maundrel, 10 Ves. 246, 271. See Peake's Ev. 341, 3d ed. And in cases where land has been sold by executors or administrators, under a legal authority to sell, it has been settled, that strangers to the title, those who have no estate or privity of estate or interest, and who pretend to none, affected by the sale, shall not be entitled to set up the title of the heirs, or to call on the executor or administrator for strict proof of the regularity of all his proceedings in the sale. Knox *v.* Jenks, 7 Mass. 488. And a stranger to a mortgage is not permitted to set it up, to defeat a legal title in the plaintiff. Collins *v.* Torry, 7 Johns. 278; Jackson *v.* Pratt, 10 Id. 381. [*227

These cases clearly show, that the doctrine has been very much narrowed down. It remains to consider, whether the doctrine has ever been established, that a mere superior outstanding title in a third person, with whom the defendant has no privity, can be given in evidence, in an ejectment, to defeat a possessory title in the plaintiff, which is superior to that of the defendant. It is manifest, that at the time when Lord MANSFIELD delivered his opinion, in Doe *v.* Pegge (1 T. R. 758, note), he did not consider any such doctrine as established, for he confines his opinion to the mere case of a mortgagee, as against his mortgagor, although he states the question in the broadest terms; and if the decisions had then gone the whole length, he would certainly have so stated. Nor is there any subsequent case in England, in which the point has been decided. The case of Doe *v.* Reade, 8 East 355, turned upon the circumstance that the defendant, being lawfully in possession, might defend himself upon his title, though twenty years had run against him, before he took possession, the plaintiff in ejectment not claiming under the prior adverse possession; and the case of Goodtitle *v.* Baldwin, 11 East 488, turned upon the distinction, that the premises were crown lands, which, by statute, could not be granted, and that the possession of the plaintiff and the defendant was to be presumed by the license of the crown. [*228

Undoubtedly, the plaintiff must show that he has a good possessory title; and therefore, if the defendant show that he has conveyed the land, unless the conveyance was void by reason of a prior disseisin, the plaintiff cannot recover. Gould *v.* Newman, 6 Mass. 239; Wolcott *v.* Knight, 6 Id. 418; Everenden *v.* Beaumont, 7 Id. 76; Williams *v.* Jackson, 5 Johns. 489; Phelps *v.* Sage, 2 Day 151. So, a tenant may show, that the title of his landlord has expired. England *v.* Slade, 4 T. R. 682. So, in an ejectment by a *cestui que trust*, the tenant may set up in his defence, the legal outstanding title in the trustee. Doe *v.* Staples, 2 T. R. 684. For in all these cases, the evidence shows that the plaintiff has no subsisting possessory title at law, and therefore, he ought not to be permitted to disturb the tenant's possession. The general rule is, that possession constitutes a sufficient title against every person not having a better title; and therefore, the tenant may stand upon his mere naked possession, until a better title is shown. "*In æquali jure melior est conditio possidentis;* he that hath possession of lands, though it be by disseisin, hath a right against all men but against

him that hath right." Doct. & Stud. 9; 8 Shep. Abridg. 26. And the rule of the civil law is the same. *Non possesserio incumbit necessitas probandi possessiones ad se pertinere.* Cod. lib. 4, cited *2 Bro. Civ. & Adm. Law, 371, note.

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And possession, although it be merely a naked possession, or acquired by wrong, as by disseisin, is also a title upon which a recovery can be had. For, as Blackstone justly observes, "in the meantime, till some act be done by the rightful owner to divest the possession, and assert his title, such actual possession is *primâ facie* evidence of a legal title in the possessor; and it may, by length of time, and negligence of him who hath the right, by degrees, ripen into a perfect and indefeasible title." 2 Bl. Com. 196. So, Jenkins, in his Centuries of Reports 42, states that the first possession, without any other title, serves in an assize for land. In Batement *v.* Allen, Cro. Eliz. 437, it was held, that the plaintiff was entitled to recover, in ejectment, where it was found by special verdict, that the defendant had not the first possession, nor entered under title, but upon the plaintiff's possession. And in Allen *v.* Rivington, 2 Saund. 111, where, upon a special verdict, in ejectment, it appeared, that the plaintiff had a priority of possession, and no title was found for the defendant, Saunders says, the matter in law was never argued, for the priority of possession alone gives a good title to the lessor of the plaintiff, against the defendant, and all the world, excepting against the rightful owner. And in a late case, it was held, that mere prior occupancy of land, however recent, gives a good title to the occupier, whereupon, he may recover, as plaintiff, against all the world, except such as can prove an older and better title in themselves. Catteris *v.* Cooper, 4 Taunt. 547. See also, 8 East 358. And this doctrine has been frequently recognised in the American courts. Jackson *v.* Hazen, 2 Johns. 22; Jackson *v.* Harder, 4 Id. 202. The last case goes further, and decides, that a mere intruder upon lands should not be permitted to protect his intrusion, in a suit by the person upon whom he has intruded, by setting up an outstanding title in a stranger. And in Smith *v.* Lorillard, 10 Johns. 338, all the authorities were reviewed, and it was held, that it is not necessary for the plaintiff in ejectment to show, in every case, a possession of twenty years, or *a paper title; that a possession for a less period will form a presumption of title, sufficient to put the tenant upon his defence, and that a prior possession, short of twenty years, under a claim or assertion of right, will prevail over a subsequent possession of less than twenty years, when no other evidence of title appears on either side. In respect to real actions, it is said by Chief Justice Parsons, that under the general issue, the defendant cannot give in evidence a title under which he does not claim; unless it be to rebut the demandant's evidence of seisin: but that he may plead in bar a conveyance by the demandant to a third person under whom he does not claim; for if the tenant have no right, yet if the demandant have no right, he cannot, in law, draw into question the tenant's seisin, whether acquired by right or by wrong. Wolcott *v.* Knight, 6 Mass. 418; Gould *v.* Newman, Id. 239.

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It is remarkable, that in none of the foregoing cases the point is stated to have been ever decided upon the naked question, whether a better subsisting title in a third person can be given in evidence by a defendant, who has no privity with that title, to defeat a title in the plaintiff, which is yet superior to that under which the defendant holds the land. Blackstone puts a case in point: "If tenant in tail enfeoffs A. in fee-simple and dies, and B. disseises A., now, B. will have the possession, A. the right of possession, and the issue in tail the right of property. A. may recover the possession against B. and afterwards the issue in tail may evict A., and unite in himself, the possession, the right of possession, and also the right of property." 2 Bl. Com. 199. Here, B. is an intruder, and therefore, comes within reach of the case of Jackson *v.* Harder, 4 Johns. 202. But if B. had conveyed to C. and then A. had brought an ejectment against C., could the latter have set up the title of the issue in tail, with which he had no privity, although that were a good subsisting superior title, to defeat the recovery of A.? It becomes not the annotator to express any opinion on this point; his only

*Dunlop *v.* Hepburn *et al.*

Mesne profits.

Explanation of the decree in this cause (1 Wheat. 179), that the defendants were only to be accountable for the rents and profits of the lands referred to in the proceedings, actually received by them.

Appeal from the Circuit Court for the district of Columbia.

February 24th, 1818. Washington, Justice, delivered the opinion of the court.—By the decree of this court, made in this cause, at February term 1816 (1 Wheat. 179), the defendants were ordered "to make up, state and settle, before a commissioner or commissioners to be appointed by the circuit court of the district of Columbia for the county of Alexandria, an account of the rents and profits of the tract of land referred to in the proceedings, since the 27th day of March 1809, and that they pay over the same to the complainants, John Dunlop & Co., or to their lawful agent or attorney." The commissioners appointed by the circuit court to execute this part of the decree of this court made a report, in which they state, "that it did not appear to them that the said William Hepburn and John Dundas, or the legal representatives of the said Dundas, ever received any rents or profits of the land from the 27th day of March 1809, until the date of the report; but *that [*232
the reasonable rents and profits of the said land, in its untenantable situation, from the said 27th day of March 1809, to the 27th day of March 1816, with due care, would be equal to $2077.60."

The cause coming on to be heard in the court below, on this report, and that court being of opinion, that under the decree of this court, the defendants were only to be accountable for the rents and profits actually received, it was decreed, that the bill, so far as it seeks a recovery of rents and profits, should be dismissed; from which decree, an appeal was prayed to this court.

I am instructed by the court to say, that the decree of the circuit court is in strict conformity with the decree and mandate of this court and is, therefore, to be affirmed.

Decree affirmed.

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object is to bring the authorities in review before the learned reader, and to suggest that it may yet be considered as subject to judicial doubt.[1]

[1] To defeat an ejectment, by proof of an outstanding title, it must be a valid and subsisting one. Hunter *v.* Cochran, 3 Penn. St. 105: Sherk *v.* McElroy, 20 Id. 25; Wray *v.* Miller, Id. 111; Riland *v.* Eckert, 23 Id. 215; McBarron *v.* Gilbert, 42 Id. 268. The general rule is, that the plaintiff in ejectment must recover on the strength of his own title, and when an outstanding title, *better than his own*, is shown, he must fail to recover. Bear Valley Coal Co. *v.* Durant, 95 Penn. St. 72.

UNITED STATES *v.* 150 CRATES OF EARTHEN-WARE.

Forfeiture.

Libel for a forfeiture of goods imported, and alleged to have been invoiced at a less sum than the actual cost at the place of exportation, with design to evade the duties, contrary to the 66th section of the collection law, ch. 128. Restitution decreed, upon the evidence as to the cost of the goods, at the place where they were last shipped—the form of the libel excluding all inquiry as to their cost at the place where they were originally shipped, and as to continuity of voyage.

*233] *APPEAL from the District Court of Louisiana. This case was argued by the *Attorney-General*, for the United States, and by *D. B. Ogden*, for the claimant.

MARSHALL, Ch. J., delivered the opinion of the court.—In this case, the libel alleges, that the goods in question were exported from Bordeaux, in France, and entered at the office of the collector of the customs, at New Orleans, and that they were invoiced at a less sum than the actual cost thereof, at the place of exportation, with design to evade the duties thereon, contrary to the provisions of the 66th section of the collection law of 1799, ch. 128.

It appears in the case, that the goods were originally shipped from Liverpool, and were landed at Bordeaux. All question as to continuity of voyage, and as to whether Liverpool or Bordeaux ought to be deemed the place of exportation, is out of the case, because the information charges the goods to have been exported from Bordeaux. Upon the evidence, it appears, that the goods were invoiced at sixty or seventy per cent. below the price in New Orleans; which is supposed, was at least as high as the price would have been in Liverpool: but it also appears, that goods of this kind, at the time of their exportation from Bordeaux, were depreciated in value to an equal degree: and it is proved, that the same goods were offered to a witness at 50 per cent. below their cost at Liverpool. The court is, therefore, not satisfied, that the goods were invoiced below their true value at Bordeaux,

*234] with a design to evade the lawful *duties; and the inquiry as to their value in the port from which they were originally shipped is excluded, by the form in which the libel is drawn. The decree of the district court, restoring the goods to the claimant, is, therefore, affirmed.

Decree affirmed.

HAMPTON *v.* MCCONNELL.

Judgment of state court.

A judgment of a state court has the same credit, validity and effect in every other court within the United States, which it had in the state where it was rendered; and whatever pleas would be good to a suit thereon, in such state, and none others, can be pleaded, in any other court within the United States.

ERROR to the Circuit Court for the district of South Carolina. The defendant in error declared against the plaintiff in error, in debt, on a judgment of the supreme court of the state of New York, to which the defendant below pleaded *nil debet*, and the plaintiff below demurred. The circuit court rendered a judgment for the plaintiff below, and thereupon, the cause was brought by writ of error to this court.

February 14th. *Hopkinson*, for the plaintiff in error, suggested, that if, under any possible circumstannes, the plea of *nil debet* could be a good bar to the action, a general demurrer was insufficient. He cited *Mills* v. *Duryee*, 7 Cranch 481, *and stated that the present case might, perhaps, be distinguished from that, as it would seem, that in *Mills* v. *Duryee*, [*235 the defendant had actually appeared to the suit upon which the original judgment was recovered; but that, in the present case, there was no averment in the declaration to that effect, and the proceeding in the former suit might have been by attachment *in rem*, without notice to the party.

Law, for the defendant in error, relied upon the authority of *Mills* v. *Duryee*, as conclusive, to show that *nul tiel record* ought to have been pleaded. He also cited *Armstrong* v. *Carson's executors*, 2 Dall. 302.

February 24th, 1818. MARSHALL, Ch. J., delivered the opinion of the court.—This is precisely the same case as that of *Mills* v. *Duryee;* the court cannot distinguish the two cases. The doctrine there held was, that the judgment of a state court should have the same credit, validity and effect, in every other court in the United States, which it had in the state where it was pronounced, and that whatever pleas would be good to a suit thereon in such state, and none others, could be pleaded in any other court in the United States.

Judgment affirmed. (*a*)

(*a*) In Mills *v.* Duryee, 7 Cranch 481, the following points were adjudged: 1st. That the act of 1790, ch. 38, prescribing the mode in which the public acts, records and judicial proceedings, in each state, shall be so authenticated as to take effect in every other state, declaring that the record of a judgment duly authenticated shall have such faith and *credit as it has in the state court from whence it was taken; if, [*236 in such court, it has the effect of record evidence, it must have the same effect in every other court within the United States. 2d. That in every case arising under the act, the only inquiry is, what is the effect of the judgment in the state where it pas rendered. 3d. That whatever might be the effect of a plea of *nil debet* to an action on a state judgment, after verdict, it could not be sustained on demurrer. 4th. That on such a plea, the original record need not be produced for inspection, but that an exemplication thereof is sufficient. 5th. That the act applies to the courts of the district of Columbia, and to every other court within the United States.

In the argument of Borden *v.* Fitch, 15 Johns. 121, in the supreme court of New York, it seems to have been supposed, that this court had decided, in Mills *v.* Duryee, that *nul tiel record* was the only proper plea to an action upon a state judgment. But is is conceived, that as to the pleadings, it only decided, that *nil debet* was not a proper plea; and that the court would hold that any plea (as well as *nul tiel record*) that would avoid the judgment, if technically pleaded, would be good. However this may be, it may safely be affirmed, that the question is still open in this court, whether a special plea of fraud might not be pleaded, or a plea to the jurisdiction of the court in which the judgment was obtained; for these might, in some cases, be pleaded in the state court to avoid the judgment.[1]

[1] It is now settled, that it is competent to show that the judgment was obtained by fraud, or that the court had no jurisdiction. Warren Manufacturing Co. *v.* Ætna Ins. Co., 2 Paine 502. A judgment obtained in a state court, without service upon the defendant, otherwise show by publication, is not evidence of any personal liability, outside of the state in which it was rendered. Board of Public Works *v.* Columbia College, 17 Wall. 521. The constitution does not prevent an inquiry into the jurisdiction of the court of another state, by which a judgment has been rendered, either as to the person or subject-matter. Thompson *v.* Whit-

The FORTUNA: KRAUSE *et al.*, Claimants.

Prize.—Further proof.

A question of proprietary interest and concealment of papers. Further proof ordered, open to both parties. On the production of further proof by the claimants, condemnation pronounced.

*237] Where a neutral ship-owner lends his name to cover a fraud with regard to the cargo, this circumstance will subject the ship to condemnation.

It is a relaxation of the rules of the prize court, to allow time for further proof, in a case where there has been concealment of material papers.

The Fortuna, 1 Brock. 299, affirmed.

THIS is the same cause which is reported in 2 Wheat. 161, and which was ordered to further proof, at the last term. It was submitted, without argument, upon the further proof, at the present term.

February 26th, 1818. JOHNSON, Justice, delivered the opinion of the court. —Both vessel and cargo, in this case, are claimed in behalf of M. & J. Krause, Russian merchants, resident at Riga. The documents and evidence exhibit Martin Krause as the proprietor of the ship, but the master swears that he considered her as the property of the house of M. & J. Krause, from their having exercised the ordinary acts of ownership over her; and in this belief, he is supported by the fact, that his contract is made with John Krause, by whom he appears to have been put in command of the ship. (*a*)

*238] Martin Krause, *who appears in the grand bill of sale, is the same Martin Krause who is member of the firm of M. & J. Krause.

In all its prominent features, this case bears a striking resemblance to the case of *The St. Nicholas*. A vessel, documented as Russian, is placed under the absolute control of a British house, is dispatched, under the orders of that house, to the Havana, where she is loaded, under the directions of an individual of the name of Muhlenbruck, who assumes the character of agent of the Russian owners; she is then ostensibly cleared out for Riga, but with express orders to call at a British port, and terminate her voyage, under the orders of the same house, under the auspices of which, the adventure had originated and been so far conducted.

Under these circumstances, it was certainly incumbent upon the claimant

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(*a*) Translation of Exhibit, 287, A. "On the following conditions, have I given to Captain Henry Behrens, the command of the ship Fortuna, under Russian colors, lying at present in Riga. 1. Captain Behrens shall have 25 Alberts dollars, monthly wages. 2. The whole cabin freight has been allowed him. 3. He is to receive five per cent. primage. 4. Travelling expenses for the benefit of the vessel, as likewise, victualling expenses for the use of the ship in port, consistent with moderation, have been allowed to the captain. Captain Behrens, on his part, promises to watch the interest of his owner in every respect, and do the best he can for the benefit of the vessel. For the fulfilment of the present contract I bind myself by my signature.

"Riga, the 12th of August 1813.

Per Proc. John Krause,
(Signed) SCHULTZ."

man, 18 Wall. 457; Knowles *v.* Logansport Gas-Light and Coke Co., 19 Id. 58. The states have power to enact statutes of limitation, as to actions on judgments rendered in other states, provided a reasonable time be allowed for the commencement of a suit, before the bar takes effect. Bank of Alabama *v.* Dalton, 9 How. 522; Bacon *v.* Howard, 20 Id. 22; Terry *v.* Anderson, 95 U. S. 628. But they cannot create an absolute immediate bar to an existing right of action. Christmas *v.* Russell, 5 Wall. 290.

to show the previous correspondence of the British with the Russian house, and the immediate dependence of the agent at the Havana upon the Russian house for authority, instructions and resources. When we come to compare the correspondence of Muhlenbruck with that of Smith, the agent in the St. Nicholas, we find here also a striking similitude. In that case, the supposed correspondence with the Russian principal is inclosed, *nnder cover, to the British house, with a request that they would forward [*239 it. In this case, the letters covering the invoice and bill of lading, and directed to M. & J. Krause, is confided to the master, but with express instructions to forward it to the British house, and await their orders.

The material facts on which the court relies, in making up its judgment on the claim of the cargo, are the following: In the first place, there is a general shade of suspicion cast over the whole case, by the fact, that all the material papers relating to the transaction were mysteriously concealed in a billet of wood. Had there been nothing fraudulent intended, these papers ought to have been delivered along with the documentary evidence. But they were not discovered, until betrayed by one of the crew. It is upon the investigation of these papers, principally, that the circumstances occur, which discover the true character of this voyage. Secondly. There is no evidence that this adventure was ever undertaken under instructions from M. & J. Krause. But there is evidence that everything is set in motion at the touch of Bennet & Co., of London. And although they affect to act in the capacity of agents of the Russian house, even the rules of the common law would constitute them principals, in a case in which they cannot exhibit the authority under which they assume the character of agents. Again, there is no evidence that any funds were furnished by the Russian house, for the purchase of this cargo. But there is evidence, and *we think [*240 conclusive evidence, to show, that it was purchased on funds of the British house, remitted through the medium of the cargo of the Robert Bruce, a ship loaded by Bennet & Co., and dispatched, about the same time, for the Havana. In the letter of instructions of the 18th of March 1813,(*a*)

(*a*) "London, 18th November 1813, Capt. Henry Behrens:—As we have settled your ship's accounts by paying you a balance of 206*l.* 16*s.* 11*d.*, up to November 13th, we now agree, that the arrangement made with Messrs. M. & J. Krause, when you were last at Riga, shall continue in force for the pending voyage, so far as relates to your pay and primage, and we agree to pay you a gratuity of one hundred pounds (100*l.*) sterling, at the exchange current, whenever your voyage shall end, and likewise to allow you your cabin freight at the rate which the ship receives for her cargo. We have ordered Mr. J. F. Muhlenbruck to supply you with the cash necessary for your expenses in the Havana, when arrived out, which we beg may be as little as possible. And in case of your wanting any aid in Portsmouth, apply to Mr. Andrew Lindergreen, or in Plymouth, to Messrs. Fuge & Son, or in Falmouth, to Messrs. Fox & Son, who will supply you, on showing this letter. We desire that you will, with your ship Fortuna, as speedy as possible, join the West India convoy, now lying at Portsmouth, taking sailing instructions, and proceed with the same convoy to the Havana, where you will apply to Mr. J. F. Muhlenbruck, at Messrs. Ychazo & Carricabura, merchants there. You will receive at the Havana, Mr. J. F. Muhlenbruck's instructions, which you will follow implicitely. Mr. J. F. Muhlenbruck goes out to the Havana, on board the Robert Bruce, or some other vessel in the convoy, if the Robert Bruce is too late. Should any accident befal him, in the vessel on board of which he goes, so that it is ascertained that Mr. J. F. Muhlenbruck cannot arrive at the Havana, or if he should

the *master is told to proceed to the Havana and await the arrival of Muhlenbruck, in the Robert Bruce, for orders; and in case of any accident befalling that vessel, to apply to the Spanish house of Ychazo & Carrickabura, at the Havana, for further instructions. And in a letter to the house of Lorent & Steinwitz, of Charleston, Bennet & Co. inform them, that the Fortuna is dispatched to the Havana, to the address of Ychazo & Carrickabura, to obtain a freight for the Baltic, and request Lorent & Steinwitz to advise that house, if they could obtain a freight for her to any port in Europe. This correspondence is explained thus: the cargo of the Robert Bruce would probably be sufficient to load this ship with colonial produce; if she arrives in safety, the original adventure can then proceed, but should she be captured or lost, some return freight must then be found for the Fortuna. And accordingly, we find in the letter to Bennet & Co., of the 24th
*242] March,(a) Muhlenbruck solicits *a credit on Jamaica or Cadiz, as he expresses it, "to be able to settle the surplus of the amount already

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not be arrived there, sixty days (60) after you have arrived there, you will consult wilh Messrs. Ychazo & Carricabura, what is best to be done. Should the convoy be gone, on your arrival at Portsmouth, you are at liberty at follow it, without convoy. Wishing you a good voyage, we remain, &c.

(Signed) BENNET & Co.

"On your arrival at Leith, apply to Ogilvie & Patterson."

(a) "Messrs. Bennet & Co., London. Havana, 24th March 1814.

"Gentlemen:—I have the honor to refer you to my last letters of 1st of February, and the 1st of March, of which I have sent you, by different opportunities, triplicates. The first letter principally contained to request the favor of your opening me a credit in Jamaica or Cadiz, to be able to settle the surplus of the amount already shipped, which may be left out of the proceeds of the outbound shipment of the Robert Bruce. I hope that the above letter has reached you, in time to grant me, as soon as possible, the favor, and beg to be convinced that only the greatest necessity engages me to request it; not being able to draw on either America or England. I have now the greatest pleasure to inform you, of the safe arrival of the Robert Bruce, James Chessel, master, on the 19th, under protection of his majesty's ship North Star, Captain Thomas Coe, from Jamaica. From Cork, she sailed with convoy, consisting of his majesty's ship Leviathan 74, Captain Adam Drummond, the Talbot 20, Captain Spelman Swaine, and the Scorpion of 18 guns. Therefore, she has been the whole voyage under convoy, and the insurers have to pay the full returns of six per cent. The North Star which sails to-morrow, takes all the ready vessels for Europe out to Bermuda; from thence, another convoy will be granted to protect them to England, or at least, as far as the latitude of Halifax. The Russian ship Fortuna, Captain Behrens, laden with 1520 boxes assorted sugars, bound to Riga, and for account and risk of Messrs. M. & J. Krause, at that place, is ready to join this convoy. I inclose you invoice and bill of lading, which you will be pleased to forward with the first opportunity to the above friends. The Captain Behrens has got instructions from me, to touch, according to the prevailing winds, either in Leith, or in the channel. By the present circumstances on the continent of Europe, Messrs. M. & J. Krause may have been induced to send this cargo to a better market than it probably meets at Riga. Should they have given you any instructions concerning this vessel, then Captain Behrens has orders to wait for your kind information in regard of the farther destination, which orders from you I beg to send him as soon as you know at what port of the above mentioned he has arrived, in England. Please to inform also Messrs. M. & J. Krause, that I have advanced here the captain 1332 dollars 4 cents, for the use of the ship Fortuna. Next week, the cargo of the Robert Bruce will be all delivered, and I endeavor to procure the highest prices possible. The Oznaburgs will sell as well as the Estopillas, but I am sorry you was

shipped, which may be left out of the proceeds of the outward bound shipment of the Robert Bruce." Now, the only shipment he had then made was by the Fortuna; and this letter gives advice of that *shipment, as also [*243 of the arrival of the Robert Bruce, and the progress he had made in disposing of her cargo. The passage quoted means, therefore (although somewhat obscurely expressed), "It is possible that the outward cargo of the Robert Bruce may not be sufficient to pay for the shipment already *made by the Fortuna, and you must, therefore, furnish me with a [*244 credit to make up the deficiency." Ychazo & Carrickabura, no doubt, advanced for the purchase of the cargo of sugars, upon the credit of the cargo of the Robert Bruce, and accordingly, we find that house charging a commission for advancing. On these facts, we are satisfied, that the cargo was purchased with British funds.

Lastly, there is no evidence that Muhlenbruck was the agent of M. & J. Krause, and there is abundant evidence of his being the avowed and confidential agent of the British house. We see, in the midst of the greatest anxiety to keep up the character of agent to the Russian house, this gentleman, without being aware of it, does an act which at once shows to whom he holds himself accountable. In his letter to Bennet & Co., of the 24th of March, he requests them to inform the Russian house, that he has made certain advances on account of the ship. But why request Bennet & Co., to do this, if he was himself in immediate connection and correspondence with the Russian house? The fact is, his correspondence with the Russian house was fictitious, and his object was, to inform Bennet & Co., in reality, whilst he feigned to address himself to M. & J. Krause, and thus the letter to the latter house, covering the invoice and bill of lading, although of the same date with that to Bennet & Co., omits this piece of information, which in a real correspondence, would be groundwork of a credit to himself; and contains nothing but the most general information, just enough, in fact, *to [*245 gloss over the transaction, and give it the aspect of reality(*a*).

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not able to get more of the latter, and of a finer quality, being always the leading article of an assortment of linen. The prices of sugar are nearly the same, and the arrival of this convoy has brought them up ⅛ to ¼ dollar higher. Coffee is lower, and I expect to buy and lay in good coffee, at 10 to 11 dollars. Messrs. Hubberts, Taylor & Simpson inform me, that I may not expect a convoy leaving Jamaica before the 30th of April. This same convoy can arrive here the 10th or 15th of May, and all possible exertion shall be made on my side to get the Robert Bruce laden, before this time. I have till now not received an answer of Messrs. Hibberts, respecting the bills on London. Your kind letter of the 18th of December, I have duly received. I am happy that the sugars are bought within your limits, and wish to be as fortunate with those wanted for the Robert Bruce's cargo. I have the honor, &c.

(Signed) J. F. MUHLENBRUCK."

(*a*) (Translation.)

"Havana, 24th March 1814.

"Messrs. M. & J. Krause, Riga:

"With the present, I have the honor to send you the invoice and bill of lading of a cargo of sugars for your esteemed account, in the Fortuna, Captain H. Behrens. The ship could not take more than 1520 boxes white, and 600 brown, with Campeachy wood, which was necessary for stowing; together $57,517.04, for which you will please give me credit. The sugars are of the new crop, bought at a moderate price, and of a very good quality. And I flatter myself you will be content with the fulfilment of your

With regard to the vessel, it would be enough to observe, that if a neutral ship-owner will lend his name to cover a fraud with regard to the cargo, this circumstance alone will subject him to condemnation. But in this case, there are also many circumstances to maintain a suspicion that the vessel was British property, or, at least, not owned as claimed. Although this course, from extreme anxiety to avoid subjecting a neutral to condemnation, has relaxed its rules in allowing time for further proof, in a case were there was concealment of papers, yet nothing has been brought forwarded to support
*246] the neutral character *of the ship. No charter-party, no original correspondence, nothing, in fact, but those formal papers which never fail to accompany a fictitious, as well as a real, transaction. On the contrary, we find the master, without any instructions from his supposed owners, submitting implicitly to the orders of Bennet & Co., in everything; and the latter assuming even a control over the contract which he exhibits with his supposed owner in Riga, and expressing a solicitude about his expenses, which could only have been suggested by a consciousness that the house of B. & Co. would have to pay those expenses.

Upon the whole, we are satisfied, that it is a case for condemnation both of ship and cargo.

Decree affirmed.

Gelston *et al. v.* Hoyt.

Error to state courts. — Jurisdiction. — Seizure. — Neutrality law. — Pleading.

Under the judiciary act of 1789, § 25, giving appellate jurisdiction to the supreme court of the United States, from the final judgment or decree of the highest court of law or equity of a state, in certain cases, the writ of error, may be directed to any court in which the record and judgment on which it is to act, may be found; and if the record has been remitted, by the highest court, &c., to another court of the state, it may be brought by the writ of error, from that court.[1]

The courts of the United States have an exclusive cognisance of the questions of forfeiture, upon all seizures made under the laws of the *United States, and it is not competent for a state court
*247] to entertain or decide such question of forfeiture. If a sentence of condemation be definitively pronounced by the proper court of the United States, it is conclusive that a forfeiture is incurred; if a sentence of acquittal, it is equally conclusive against the forfeiture; and in either case, the question cannot be again litigated in any common-law *forum*.

Where a seizure is made for a supposed forfeiture, under a law of the United States, no action of trespass lies in any common-law tribunal, until a final decree is pronounced upon the proceeding *in rem* to enforce such forfeiture; for it depends upon the final decree of the court proceeding *in rem*, whether such seizure is to be deemed rightful or tortious, and the action, if brought before such decree is made, is brought too soon.

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kind commission. As there is a convoy leaving this place to-morrow, for Bermuda, I found it advisable for the Fortuna to join the same, and wish her a very quick and safe passage. Of the above documents, I shall send you duplicates, when I have the honor to write you again. The prices of Russian articles are at present—Raven's Duck, $16, Canvas $42. Iron can only be sold with a loss, and in small quantities, as the price has fallen, &c. (Signed) J. F. Muhlenbruck."

[1] Webster v. Reid, 11 How. 437; McGuire v. Massachusetts, 3 Wall. 382. The writ must be directed to the highest state court in which a decision can be had, though an inferior one. Downham v. Alexandria, 9 Wall. 659; Miller v. Joseph, 17 Id. 655. And see Atherton v. Fowler, 91 U. S. 143.

Gelston v. Hoyt.

If a suit be brought against the seizing officer, for the supposed trespass, while the suit for the forfeiture is depending, the fact of such pendency may be pleaded in abatement, or as a temporary bar of the action.[1] If, after a decree of condemation, then, that fact may be pleaded as a bar; if after an acquittal, with a certificate of reasonable cause of seizure, then, that may be pleaded as a bar. If, after an acquittal, without such certificate, then, the officer is without any justification for the seizure, and it is definitively settled to be a tortious act. If, to an action of trespass in a state court for a seizure, the seizing officer plead the fact of forfeiture, in his defence, without averring a *lis pendens* or a condemnation, or an acquittal with a certificate of reasonable cause of seizure, the plea is bad; for it attempts to put in issue the question of forfeiture, in a state court.

At common law, any person may, at his peril, seize for a forfeiture to the government, and if the government adopt his seizure, and the property is condemned, he is justified.[2] By the act of the 18th of February 1793, § 27, officers of the revenue are authorized to make seizures of any ship or goods, for any breach of the laws of the United States.

The statute of 1794, § 3, prohibiting the fitting out any ship, &c., for the service of any foreign prince or states, to cruise against the subjects, &c., of any other foreign prince or state, does not apply to any new government, unless it has been acknowledged by the United States, or by the government of the country to which such new state belonged. And a plea which sets up a forfeiture, under that act, in fitting out a ship to cruise against such new state, must aver such recognition, or it is bad.

A plea, justifying a seizure under this statute, need not state the particular *prince or [*248
state, by name, against whom the ship was intended to cruise.

A plea, justifying a seizure and detention, by virtue of the 7th section of the act of 1794, under the express instructions of the president, must aver, that the naval or military force of the United States was employed for that purpose, and that the seizer belonged to the force so employed. The 7th section of the act was not intended to apply, except to cases where a seizure or detention could not be enforced by the ordinary civil power, and there was a necessity, in the opinion of the president, to employ naval or military power for this purpose.

To trespass, for taking and detaining, and converting property, it is sufficient to plead a justification of the taking and detention; and if the plaintiff relies on the conversion, he should reply it, by way of new assignment.

A plea, alleging a seizure for a forfeiture, as a justification, should not only state the facts relied on to establish the forfeiture, but aver, that thereby the property became and was actually forfeited, and was seized as forfeited.

Gelston *v.* Hoyt, 13 Johns. 561, affirmed.

ERROR to the Court for the Trial of Impeachments and Correction of Errors of the state of New York.

This cause had been removed into that court, by the present plaintiffs in error, by writ of error, directed to the supreme court of the said state. In January 1816, the court of the state of New York for the correction of errors in all things affirmed the judgment which had been rendered by the supreme court of the state of New York, in favor of Hoyt, the present defendant in error. And before the coming of the writ of error issued from this court, the said court for the correction of errors of the state of New York, according to the laws of the state of New York, and the practice of that court, had remitted the record, which had been removed from the supreme court of the state of New York, to the said supreme court, with a mandate thereon requiring the *supreme court of the state of New York to [*249
execute the judgment, which had been so rendered by it, in favor of the defendant in error. And the said record having been so remitted, the court of errors of the state of New York, upon the coming of the said writ of error from this court, made the following return thereto:

"State of New York, ss. The president of the senate, the senators, chancellor and judges of the supreme court, in the court for the trial of impeachments

[1] Hall *v.* Warren, 2 McLean 382.

[2] The Caledonian, 4 Wheat. 100.

and the correction of errors, certify and return to the supreme court of the United States, that before the coming of their writ of error, the transcript of the record in the cause, in the said writ of error mentioned, together with the judgment of this court thereon, and all things touching the same, were duly remitted, in pursuance of the statute instituting this court, into the supreme court of judicature of this state, to the end that further proceedings might be thereupon had, as well for execution, as otherwise, as might be agreeable to law and justice; and in which supreme court of judicature, the said judgment, and all other proceedings in the said suit, now remain of record; and as the same are no longer before, or within the cognizance of this court, this court is unable to make any other or further return to the said writ. All which is humbly submitted."

Thereupon, the counsel for the plaintiffs in error made an application to the supreme court of the state of New York, to stay the proceedings upon the said judgment, until an application could be made to this court in respect to the said writ of error. To avoid this delay, the counsel, under the advice *250] or suggestion of the *judges of the said supreme court of the state of New York, entered into the following agreement, viz:

"It is agreed between the attorneys of the above-named plaintiffs and defendant in error, that the annexed is a true copy of the record and bill of exceptions, returned by the supreme court of the state of New York, to the court of errors of the said state, and remitted by the said court of errors, in the affirmance of the judgment of the said supreme court to the said supreme court. And that the said copy shall be considered by the said supreme court of the United States, as a true copy of the said record and bill of exceptions, and shall have the same effect, as if annexed to the writ of error in the above cause, from the said supreme court of the United States, and that the clerk of the supreme court of the state of New York transmit the same, with this agreement to the clerk of the supreme court of the United States, and that the same be annexed by the said clerk of the supreme court of the United States, to the said writ of error, as a true copy of the said record and bill of exceptions."

Record and Bill of Exceptions.

City and County of New York, ss: Be it remembered, that in the term of January, in the year of our Lord 1813, came Goold Hoyt, by Charles Graham, his attorney, into the supreme court of judicature of the people of the state of New York, before the justices of the people of the state of New York, of the supreme court of judicature of the same people, at the capitol, in the city of Albany, and impleaded David Gelston and Peter A. *251] Schenck, in a certain plea of trespass, *on which the said Goold Hoyt declared against the said David Gelston and Peter A. Schenck, in the words following:

City and County of New York, ss: Goold Hoyt, plaintiff in this suit, complains of David Gelston and Peter A. Schenck, defendants in this suit, in custody, &c.: For that, whereas, the said defendants, on the tenth day of July, in the year of our Lord 1810, with force and arms, at the city of New York, in the county of New York, and at the first ward of the same city, the goods and chattels of the said plaintiff, of the value of $200,000, then and there found, did take and carry away, and other injuries to the said

plaintiff then and there did; to the great damage of the said plaintiff, and against the peace of the people of the state of New York.

2. And also, for that the said defendants, afterwards, to wit, on the same day and year last aforesaid, at the city and county and ward aforesaid, with force and arms, to wit, with swords, staves, hands and feet, other goods and chattels of the said plaintiff, to wit, a ship or vessel of the said plaintiff, called the American Eagle, together with her tackle, apparel and furniture, 500 tons of stone ballast, 100 hogsheads of water, 130 barrels salted provisions, 20 hogsheads of ship-bread, of the value of $200,000, at the place aforesaid found, did take and carry away, and other wrongs and injuries to to the said plaintiff then and there did; to the great damage of the said plaintiff, and against the peace of the people of the state of New York.

3. And *also, for that the said defendants, afterwards, to wit, on [*252 the same day and year, and at the place aforesaid, the goods and chattels of the said plaintiff, to wit, a ship or vessel of the said plaintiff, called the American Eagle, together with her tackle, apparel and furniture, 500 tons stone ballast, 100 hogsheads of water, 130 barrels salted provisions, and 20 hogsheads of ship-bread, of the value of $200,000, then and there being and found, seized, took, carried away, damaged and spoiled, and converted and disposed thereof, to their own use, and other wrongs to the said plaintiff, then and there did; to the great damage of the said plaintiff, and against the peace of the said people of the state of New York.

4. And also, for that the said defendants, on the same day and year aforesaid, with force and arms, to wit, with swords, staves, hands and feet, to wit, at the city, county and ward aforesaid, seized and took a certain ship or vessel, of the said plaintiff, of great value, to wit, of the value of $200,000, and in which said ship or vessel the said plaintiff then and there intended, and was about to carry and convey certain goods and merchandises, for certain freight and reward to be therefor paid to him the said plaintiff; and then and there carried away the said ship or vessel, and kept and detained the same from the said plaintiff, for a long space of time, to wit, hitherto, and converted and disposed thereof to their own use; and thereby the said plaintiff was hindered and prevented from carrying and conveying the said goods and merchandises as aforesaid, and thereby *lost [*253 and was deprived of all the profit, benefit and advantage which might and would otherwise have arisen and accrued to him therefrom, to wit, at the city, county and ward aforesaid, and other wrongs and injuries to the said plaintiff then and there did; against the peace of the people of the state of New York, and to the great damage of the said plaintiff.

5. And also, for that the said defendants, afterwards, to wit, on the same day and year last aforesaid, at the city, county and ward aforesaid, with force and arms, seized and took possession of divers goods and chattels of the said plaintiff, then and there found, and being in the whole of a large value, that is to say, a ship or vessel of the said plaintiff, called the American Eagle, together with her tackle, apparel and furniture, 500 tons of stone ballast, 100 hogsheads of water, 130 barrels of salted provisions, 20 hogsheads of ship-bread, of the value of $200,000, and stayed and continued in possession of the said goods and chattels, so by them seized and taken as aforesaid, and the said goods and chattels afterwards took and carried away, from and out of the possession of the said plaintiff; whereby, and by rea-

son, and in consequence of such said seizure, and of other the premises aforesaid, the said plaintiff not only lost, and was deprived of his said goods and chattels, and of all profits, benefits and advantages, that could have arisen and accrued to him from the use, sale, employment and disposal thereof, but was also forced and obliged to, and did actually, lay out and expend
*254] large sums of money, and to be at further trouble and expense *in and about endeavoring to obtain restitution of the property, so by the said defendants seized, as aforesaid; and other wrongs and injuries to the said plaintiff then and there did, against the peace of the people of the state of New York, and to the damage of the said plaintiff of $200,000; and therefore, he brings suit, &c.

And the said David Gelston and Peter A. Schenck thereto pleaded in the words following: And the said David Gelston and Peter A. Schenck, by Samuel B. Romaine, their attorney, come and defend the force and injury, when, &c., and say, that they are not guilty of the said supposed trespasses above laid to their charge, or any part thereof, in manner and form as the said Goold Hoyt hath above thereof complained against them, and of this they put themselves upon the country.

2. And for a further plea in this behalf, as to the several trespasses mentioned in the first, second, third, fourth and fifth counts in the declaration of the said plaintiff mentioned, to wit, in taking and carrying away the goods and chattels of the said plaintiff, mentioned in the first count in the said declaration of the said plaintiff; in taking and carrying away the goods and chattels of the said plaintiff, to wit, a ship or vessel of the said plaintiff, called the American Eagle, together with her tackle, apparel and furniture, 500 tons of stone ballast, 100 hogsheads of water, 130 barrels of salted provisions, and 20 hogsheads of ship-bread, mentioned in the second count in the second declaration of the said plaintiff; in seizing, taking,
*255] *carrying away, damaging, spoiling, converting and disposing to their own use, the goods and chattels of the said plaintiff, to wit, a ship or vessel of the said plaintiff, called the American Eagle, together with her tackle, apparel and furniture, 500 tons of stone ballast, 100 hogsheads of water, 130 barrels of salted provisions, and 20 hogsheads of ship-bread, mentioned in the third count in the said declaration of the said plaintiff; in seizing, taking, carrying away, keeping and detaining, and converting and disposing to their own use, a certain ship or vessel of the said plaintiff, mentioned in the fourth count in the said declaration of the said plaintiff; and in seizing and taking possession of, and in taking and carrying from and out of the possession of the said plaintiff, the goods and chattels of the said plaintiff, to wit, a ship or vessel of the said plaintiff, called the American Eagle, together with her tackle, apparel and furniture, 500 tons of stone ballast, 100 hogsheads of water, 130 barrels of salted provisions, and 20 hogsheads of ship-bread, mentioned in the fifth count in the said declaration of the said plaintiff, above supposed to have been committed by the said David Gelston and Peter A. Schenck; they, the said David Gelston and Peter A. Schenck, by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, say, that the said Goold Hoyt ought not to have or maintain his
*256] aforesaid action against them, because they say, that the said ship or vessel, called the American Eagle, with *her tackle, apparel and fur-

niture, the 500 tons of stone ballast, 100 hogsheads of water, 130 barrels of salted provisions, and 20 hogsheads of ship-bread, mentioned in the second, third and fifth counts in the said declaration of the said plaintiff, are the same and not other or different; and that the seizing, taking, carrying away, keeping, detaining, damaging, spoiling, converting and disposing thereof to their own use, mentioned in the second, third and fifth counts in the said declaration of the said plaintiff, are the same and not other or different. And the said David Gelston and Peter A. Schenck further say, that the ship or vessel, mentioned in the fourth count in the said declaration of the said plaintiff, is the same ship or vessel, called the American Eagle, mentioned in the second, third and fifth counts in the said declaration of the said plaintiff, and not other or different: and that the seizing, carrying away, keeping and detaining, and converting and disposing thereof to their own use, mentioned in the fourth count in the said declaration of the said plaintiff, is the same seizing, taking, carrying away, keeping and detaining, and converting and disposing thereof to their own use, mentioned in the second, third and fifth counts in the said declaration of the said plaintiff, and not other or different. And the said David Gelston and Peter A. Schenck further say, that the said ship or vessel, called the American Eagle, with her tackle, apparel and furniture, and the 500 tons of stone ballast, 100 hogsheads of water, 130 barrels of salted provisions, and *20 hogsheads of ship-bread, mentioned in the second, third and fifth counts [*257 in the said declaration of the said plaintiff, are included in, and are the only goods and chattels embraced by the general description of goods and chattels mentioned in the first count in the said declaration of the said plaintiff, and that the taking and carrying away thereof, mentioned in the said first count in the said declaration of the said plaintiff, is the same taking and carrying away thereof mentioned in the second, third and fifth counts in the said declaration of the said plaintiff, and not other or different; and that the several trespasses mentioned in the first, second, third, fourth and fifth counts in the said declaration of the said plaintiff, are the same trespasses, and not other or different. And the said David Gelston and Peter A. Schenck further say, that before the tenth day of July, in the year of our Lord 1810, to wit, on the first day of July, in the year last aforesaid, at the port of New York, in the district of New York, to wit, at the city of New York, in the county of New York, and at the first ward of the said city, the said ship or vessel, called the American Eagle, with her tackle, apparel and furniture, was attempted to be fitted out and armed, and that the said 500 tons of stone ballast, 100 hogsheads of water, 130 barrels of salted provisions, and 20 hogsheads of ship-bread, were then and there procured for the equipment of the said vessel, and were then and there on board of the said vessel, as a part of her said equipment, with intent that the said ship or vessel, *called the American Eagle, should be employed in the service [*258 of a foreign state, to wit, of that part of the island of St. Domingo which was then under the government of Petion, to commit hostilities upon the subjects of another foreign state, with which the United States of America were then at peace, to wit, of that part of the island of St. Domingo which was then under the government of Christophe, contrary to the form of the statute in such case made and provided. And the president of the said United States, to wit, James Madison, who was then president of the

said United States, by virtue of the power and authority vested in him by the constitution and laws of the said United States, did, afterwards, to wit, on the 6th day of July, in the year last aforesaid, at Washington, to wit, at the city of New York, in the county of New York, and at the ward aforesaid, authorize, empower, instruct and direct the said David Gelston and Peter A. Schenck to seize, take, carry away and detain, as forfeited to the use of the said United States, the said ship or vessel, called the American Eagle, with her tackle, apparel and furniture, and the said 500 tons of stone ballast, 100 hogsheads of water, 130 barrels of salted provisions, and 20 hogsheads of ship-bread: And the said David Gelston and Peter A. Schenck further say, that they did, afterwards, to wit, on the tenth day of July, in the year last aforesaid, at the port of New York, in the district of New York, to wit, at the city of New York, in the county of New York, and at the ward afore-
*259] said, by virtue of the said power *and authority, and in pursuance of the said instructions and directions so given as aforesaid to them, the said David Gelston, and Peter A. Schenck, by the said president of the said United States, and not otherwise, seize, take, carry away and detain the said ship or vessel, called the American Eagle, with her tackle, apparel and furniture, and the said 500 tons of stone ballast, 100 hogsheads of water, 130 barrels of salted provisions, and 20 hogsheads of ship-bread, as forfeited to the use of the said United States, according to the form of the statute in such case made and provided: And the said David Gelston and Peter A. Schenck further say, that the seizing, taking, carrying away and detaining of the said ship or vessel, with her tackle, apparel and furniture, and the said 500 tons of stone ballast, 100 hogsheads of water, 130 barrels of salted provisions, and 20 hogsheads of ship-bread, by the said David Gelston and Peter A. Schenck, on the tenth day of July 1810, as aforesaid, is the same seizing, taking, carrying away and detaining of the said ship or vessel, with her tackle, apparel and furniture, and the said 500 tons of stone ballast, 100 hogsheads of water, 130 barrels of salted provisions, and 20 hogsheads of ship-bread, mentioned in the several counts in the said declaration of the said plaintiff, and not other or different: And this they, the said David Gelston and Peter A. Schenck, are ready to verify; wherefore, they pray judg-
*260] ment, if the said Goold Hoyt ought to *have or maintain his aforesaid action thereof against them, &c.

3. And for a further plea in this behalf, as to the several trespasses mentioned in the first, second, third, fourth and fifth counts in the declaration of the said plaintiff mentioned; to wit, in taking and carrying away the goods and chattels of the said plaintiff, mentioned in the first count in the said declaration of the said plaintiff; in taking and carrying away the goods and chattels of the said plaintiff, to wit, a ship or vessel of the said plaintiff, called the American Eagle, together with her tackle, apparel and furniture, 500 tons of stone ballast, 100 hogsheads of water, 130 barrels of salted provisions, and 20 hogsheads of ship-bread, mentioned in the second count in the said declaration of the said plaintiff; in seizing, taking, carrying away, damaging, spoiling, converting and disposing to their own use, the goods and chattels of the said plaintiff, to wit, a ship or vessel of the said plaintiff, called the American Eagle, together with her tackle, apparel and furniture, 500 tons of stone ballast, 100 hogsheads of water, 130 barrels of salted provisions, and 20 hogsheads of ship-bread, mentioned in the third

count in the said declaration of the said plaintiff; in seizing, taking, carrying away, keeping and detaining, and converting and disposing to their own use, a certain ship or vessel of the said plaintiff, mentioned in the fourth count in the said declaration of the said plaintiff, and in seizing and taking possession of, and in taking and carrying from and out of the possession of the said *plaintiff, to wit, a ship or vessel of the said plaintiff, called the American Eagle, together with her tackle, apparel and furniture, 500 [*261 tons of stone ballast, 100 hogsheads of water, 130 barrels of salted provisions and 20 hogsheads of ship-bread, mentioned in the fifth count in the said declaration of the said plaintiff; above supposed to have been committed by the said David Gelston and Peter A. Schenck, they, the said David Gelston and Peter A. Schenck, by leave of the court here for this purpose first had obtained, according to the form of the statute in such case made and provided, say, that the said Goold Hoyt ought not to have or maintain his aforesaid action against them, because they say, that the said ship or vessel, called the American Eagle, with her tackle, apparel and furniture, the 500 tons of stone ballast, 100 hogsheads of water, 130 barrels of salted provisions, and 20 hogsheads of ship-bread, mentioned in the second, third and fifth counts in the said declaration of the said plaintiff, are the same, and not other or different; and that the seizing, taking, carrying away, keeping, detaining, damaging, spoiling, converting and disposing thereof to their own use, mentioned in the second, third and fifth counts in the said declaration of the said plaintiff, are the same, and not other or different: And the said David Gelston and Peter A. Schenck further say, that the ship or vessel mentioned in the fourth count in the said declaration of the said plaintiff, is the same ship or vessel, called the American Eagle, mentioned in the second, third and fifth counts *in the said declaration of the said plaintiff, and not other or different; and that the seizing, carrying [*262 away, keeping and detaining, and converting and disposing thereof, to their own use, mentioned in the fourth count in the said declaration of the said plaintiff, is the same seizing, taking, carrying away, keeping and detaining, and converting and disposing thereof to their own use, mentioned in the second, third and fifth counts in the said declaration of the said plaintiff, and not other or different: And the said David Gelston and Peter A. Schenck further say, that the said ship or vessel, called the American Eagle, with her tackle, apparel and furniture, and the 500 tons of stone ballast, 100 hogsheads of water, 130 barrels of salted provisions, and 20 hogsheads of ship-bread, mentioned in the second, third and fifth counts in the said declaration of the said plaintiff, are included in, and are the only goods and chattels embraced by the general description of goods and chattels, mentioned in the first count in the said declaration of the said plaintiff, and that the taking and carrying away thereof, mentioned in the said first count in the said declaration of the said plaintiff, is the same taking and carrying away thereof, mentioned in the said second, third and fifth counts in the said declaration of the said plaintiff, and not other or different; and that the several trespasses mentioned in the first, second, third, fourth and fifth counts in the said declaration of the said plaintiff are the same trespass, and not other or different: And the said David Gelston and Peter A. Schenck further say, *that before the tenth day of July, in the year of our Lord 1810, to wit, on the first day of July, [*263

in the year last aforesaid, at the port of New York, in the district of New York, to wit, at the city of New York, in the county of New York, and at the first ward of the said city, the said ship or vessel, called the American Eagle, with her tackle, apparel and furniture, was attempted to be fitted out and armed, and that the said 500 tons of stone ballast, 100 hogsheads of water, 130 barrels of salted provisions, and 20 hogsheads of ship-bread, were then and there procured for the equipment of the said vessel, and were then and there on board of the said vessel, as a part of her said equipment, with intent that the said ship or vessel, called the American Eagle, should be employed in the service of some foreign state, to commit hostilities upon the subjects of another foreign state, with which the United States were then at peace, contrary to the form of the statute in such case made and provided. And the president of the said United States, to wit, James Madison, who was then president of the said United States, by virtue of the power and authority vested in him by the constitution and laws of the said United States, did afterwards, to wit, on the sixth day of July, in the year last aforesaid, at Washington, to wit, at the city of New York, in the county of New York, and at the ward aforesaid, authorize, empower, instruct and direct the said David Gelston and Peter A. Schenck to take possession of, and detain the said ship or vessel, called the American Eagle, with her
*264] tackle, apparel *and furniture, and the said 500 tons of stone ballast, 100 hogsheads of water, 130 barrels of salted provisions, and 20 hogsheads of ship-bread, in order to the execution of the prohibitions and penalties of the act in such case made and provided: And the said David Gelston and Peter A. Schenck further say, that they did afterwards, to wit, on the tenth day of July, in the year last aforesaid, at the port of New York, in the district of New York, to wit, at the city of New York, in the county of New York, and at the ward aforesaid, by virtue of the said power and authority, and in pursuance of the said instructions and directions so given as aforesaid to them, the said David Gelston and Peter A. Schenck, by the said president of the said United States, and not otherwise, take possession of and detain the said ship or vessel, called the American Eagle, with her tackle, apparel and furniture, and the said 500 tons of stone ballast, 100 hogsheads of water, 130 barrels of salted provisions, and 20 hogsheads of ship-bread, in order to the execution of the prohibitions and penalties of the act in such case made and provided: And the said David Gelston and Peter A. Schenck further say, that the taking possession of, and detaining of the said ship or vessel, with her tackle, apparel and furniture, and the said 500 tons of stone ballast, 100 hogsheads of water, 130 barrels of salted provisions, and 20 hogsheads of ship-bread, by the said David Gelston and
*265] Peter A. Schenck, on the tenth day of July 1810, *as aforesaid, is the same seizing, taking, carrying away and detaining of the said ship or vessel, with her tackle, apparel and furniture, and the said 500 tons of stone ballast, 100 hogsheads of water, 130 barrels of salted provisions, and 20 hogsheads of ship-bread mentioned in the several counts in the said declaration of the said plaintiff, and not other or different: And this they, the said David Gelston and Peter A. Schenck, are ready to verify; wherefore, they pray judgment, if the said Goold Hoyt ought to have or maintain his aforesaid action thereof against them, &c.

And to which the said foregoing pleas, was subjoined the following notice,

SIR :—Please to take notice, that the defendants, at the trial of the above cause, will insist upon, and give in evidence, under the general issue above pleaded, that the ship or vessel called the American Eagle, with her tackle, apparel and furniture, before the tenth day of July, in the year of our Lord 1810, to wit, on the first day of July, in the year last aforesaid, at the port of New York, in the district of New York, to wit, at the city of New York, in the county of New York, and at the first ward of the said city, was attempted to be fitted out and armed, and was fitted out and armed, and that the said 500 tons of stone ballast, 100 hogsheads of water, 130 barrels of salted provisions, and 20 hogsheads of ship-bread, were procured for the equipment of the said vessel, and were then and there on board of the said vessel, as *a part of her said equipment, with intent that the said ship [*266 or vessel, called the American Eagle, should be employed in the service of a foreign prince or state, to wit, of that part of the island of St. Domingo which was then under the government of Petion, to cruise and commit hostilities upon the subjects, citizens and property of another foreign prince or state with which the United States were then at peace, to wit, of that part of the island of St. Domingo which was then under the government of Christophe, contrary to the form of the statute in such case made and provided: And the said defendants will also insist upon, and give in evidence, under the said plea, that the said ship or vessel, with her tackle, apparel and furniture, on the day and year last aforesaid, at the port of New York, in the district of New York, to wit, at the city of New York, in the county of New York, and at the ward aforesaid, was attempted to be fitted out and armed, and was fitted out and armed, and that the said 500 tons of stone ballast, 100 hogsheads of water, 130 barrels of salted provisions, and 20 hogsheads of ship-bread, were procured for the equipment of the said vessel, and were then and there on board of the said vessel, as a part of her said equipment, with intent that the said ship or vessel should be employed in the service of some foreign prince or state, to cruise and commit hostilites upon the subjects, citizens and property of some other foreign prince or state, with which the United States were then at peace, contrary to the form of the statute in such case made and provided. *And [*267 the said defendants will also insist upon, and give in evidence, under the said plea, that he, the said David Gelston, was collector, and that he, the said Peter A. Schenck, was surveyor of the customs for the district of the city of New York, on the 10th day of July 1810, and before that time, and that they have ever since continued to be collector and surveyor as aforesaid, and that they, the said David Gelston and Peter A. Schenck, as collector and surveyor as aforesaid, and not otherwise, did, on the said tenth day of July, in the year last aforesaid, at the port of New York, in the district of New York, to wit, at the city of New York, in the county of New York, and at the first ward of the said city, seize, take and detain the said ship or vessel, with her tackle, apparel and furniture, and the said 500 tons of stone ballast, 100 hogsheads of water, 130 barrels of salted provisions, and 20 hogsheads of ship-bread, according to the form of the statute in such case made and provided, and by virtue of the power and authority vested in them by the constitution and laws of the United States. Dated this 11th day of March 1813.

And the said Goold Hoyt, to the said first plea, joined issue, and to the

second and third pleas the said Goold Hoyt demurred, as follows: And as to the plea of the said David Gelston and Peter A. Schenck, by them first above pleaded, and whereof they have put themselves upon the country, the said Goold Hoyt doth the like, &c. And as to the pleas by the said David
*268] Gelston and *Peter A. Schenck, by them secondly and thirdly above pleaded in bar, the said Goold Hoyt saith, that the said second and third pleas of the said David Gelston and Peter A. Schenck, or either of them, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law, to bar and preclude him, the said Goold Hoyt, from having and maintaining his action aforesaid, against the said David Gelston and Peter A. Schenck; and that he, the said Goold Hoyt, is not bound by the law of the land to answer the same, and this he is ready to verify; wherefore, for want of a sufficient plea in this behalf, the said Goold Hoyt prays judgment, and his damages by him sustained, on occasion of the committing of the said trespasses, to be adjudged to him, &c.

And the said David Gelston and Peter A. Schenck thereupon joined in demurrer, as follows: And the said David Gelston and Peter A. Schenck say, that their said pleas, by them secondly and thirdly above pleaded, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are sufficient in law, to bar and preclude the said Goold Hoyt from having and maintaining his aforesaid action thereof against them, the said David Gelston and Peter A. Schenck: and that they, the said David Gelston and Peter A. Schenck, are ready to verify and prove the same, when, where and in such manner as the said court shall direct: wherefore, inasmuch as the said Goold Hoyt has not answered the said second and third pleas, nor hitherto, in any manner, denied the same, the said David
*269] Gelston *and Peter A. Schenck pray judgment, and that the said Goold Hoyt may be barred from having or maintaining, his aforesaid action thereof against them, the said David Gelston and Peter A. Schenck, &c.

And afterwards the said demurrer was brought on to be argued before the said supreme court, at the city-hall of the city of New York, and judgment was given against the said David Gelston and Peter A. Schenck, upon the said demurrer.

And afterwards, to wit, at the sittings of *nisi prius*, held at the city-hall of the city of New York aforesaid, in and for the said city and county, on the 15th day of November, in the year of our Lord 1815, before the Honorable Ambrose Spencer, Esq., one of the justices of the supreme court of judicature of the people of the state of New York, assigned to hold pleas in the said sittings, according to the form of the statue in such case made and provided, the aforesaid issue, so joined between the said parties as aforesaid, came on to be tried by a jury of the city and county of New York aforesaid, for that purposed impannelled, that is to say, Walter Sawyer, Edward Wade, William Prior, James M'Cready, Richard Loines, John Rodgers, Asher Marx, Benjamin Gomez, Samuel Milbanks, James E. Jennings, George Riker and Jacob Latting, good and lawful men of the city and county of New York aforesaid, at which day, came there as well the said Goold Hoyt, as the said David Gelston and Peter A. Schenck, by their respec-
*270] tive attorneys aforesaid, and the jurors of the jury, impannelled to *try the said issue, being called, also came, and were then and there, in

due manner, chosen and sworn to try the same issue; and upon the trial of that issue, the counsel learned in the law for the said Goold Hoyt, to maintain and prove the said issue on their part, gave in evidence, that at the time of the seizure of the said ship American Eagle, by the said David Gelston and Peter A. Schenck, she was in the actual, full and peaceable possession of the said Goold Hoyt, and that, on the acquittal of the said vessel in the district court of the United States for the district of New York, it was decreed, that the said vessel should be restored to the said Goold Hoyt, the claimant of the said vessel, in the said district court: and for that purpose, the counsel of the said Goold Hoyt gave in evidence the proceedings in the said district court of the United States, by which it appeared, that a libel had been filed in the name of the United States against the said ship American Eagle, in which it was, among other things, alleged, that the said ship had been fitted out and armed, and attempted to be fitted out and armed, equipped and furnished, with intent to be employed in the service of Petion against Christophe, and in the service of that part of the island of St. Domingo which was then under the government of Petion, against that part of the said island of St. Domingo, which was then under the government of Christophe, contrary to the statute in such case made and provided; and that the said Goold Hoyt had filed an answer to the said libel, and a claim to the said vessel, in which the said Goold Hoyt had expressly denied the truth of *the allegations in the said libel; and it also appeared by the said proceedings, [*271 that in the month of April 1811, an application had been made to said district court, by the said Goold Hoyt, to have the said ship appraised, and to have her delivered up to him, on giving security for her appraised value; and it also appeared by the said proceedings, that appraisers had been appointed by the said court, and that they had appraised the said ship, her tackle, &c., at $35,000, and that the said appraisement had been filed, and had not been excepted to; and that the sureties offered by the said Goold Hoyt, for the appraised value of the said ship, had been accepted by the said court; and it also appeared by the said proceedings, that the said cause had been tried before the said district court, and that the said libel had been dismissed, and that the said ship had been decreed to be restored to the said claimant, and that a certificate of reasonable cause for the seizure of the said vessel had been denied. And the counsel of the said Goold Hoyt, to maintain and prove the said issue, did give in evidence, that the value of the said ship, her tackle, apparel and furniture, at the time of her seizure as aforesaid, was $100,000, and did also give in evidence, that the said Peter A. Schenck seized and took possession of the said ship, by the written directions of the said David Gelston; but no other proof was offered by the said plaintiff, at that time, of any right or title in the said plaintiff to the said vessel; and here the said plaintiff rested his cause.

*Whereupon, the counsel for the defendants did then and there [*272 insist before the said justice, on the behalf of the said defendants, that the said several matters so produced and given in evidence on the part of the plaintiff as aforesaid, were insufficient, and ought not to be admitted or allowed as sufficient evidence to entitle the said plaintiff to a verdict; and the said counsel for the defendants did then and there pray the said justice to pronounce the said matters, so produced and given in evidence for

the said plaintiff, to be insufficient to entitle the said plaintiff to a verdict in the said cause, and to nonsuit the said plaintiff; but to this the counsel learned in the law of the said plaintiff objected, and did then and there insist before the said justice, that the same were sufficient, and ought to be admitted and allowed to be sufficient to entitle the said plaintiff to a verdict; and the said justice did then and there declare and deliver his opinion to the jury aforesaid, that the said several matters, so produced and given in evidence on the part of the said plaintiff, were sufficient to entitle the said plaintiff to a verdict, and that he ought not to be nonsuited: whereupon, the said counsel for the defendants did, then and there, on the behalf of the said defendants, except to the aforesaid opinion of the said justice, and insisted that the said several matters, so produced and given in evidence, were not sufficient to entitle the said plaintiff to a verdict, and that he ought to be nonsuited.

After the said motion for a nonsuit had been refused, and the opinion of the said justice had been excepted to as aforesaid, the counsel of the said
*273] *Goold Hoyt, did, in the progress of the trial, give in evidence, on the part of the said Goold Hoyt, that he purchased the said ship of James Gillespie, who had purchased her of John R. Livingston and Isaac Clason, the owners thereof; and that in pursuance of such purchase by the plaintiff, the said James Gillespie had delivered full and complete possession of the said ship, her tackle, &c., to the said plaintiff, before the taking thereof by the defendants.

And the said motion for a nonsuit having been refused, and the opinion of the said justice excepted to as aforesaid, the said counsel for the said defendants did, thereupon, state to the said jury, the nature and circumstances of the defendants' defence, and did then and there offer to prove and give in evidence, by way of defence, or in mitigation or diminution of damages, that the said ship or vessel, called the American Eagle, with her tackle, apparel and furniture, before the tenth day of July, in the year of our Lord 1810, to wit, on the first day of July, in the year last aforesaid, at the port of New York, in the southern district of New York, to wit, at the city of New York, in the county of New York, and at the first ward of the said city, was attempted to be fitted out and armed, and was fitted out and armed, and that the said 500 tons of stone ballast, 100 hogsheads of water, 130 barrels of salted provisions, and 20 hogsheads of ship-bread, were procured for the equipment of the said vessel, and were then and there on board of the said vessel, as a part of her said equipment, with intent that the
*274] *said ship or vessel, called the American Eagle, should be employed in the service of that part of the island of St. Domingo which was then under the government of Petion, to cruise and commit hostilities upon the subjects, citizens and property of that part of the island of St. Domingo which was then under the government of Christophe, contrary to the form of the statute in such case made and provided.

And the said counsel of the said defendants did then and there offer to prove and give in evidence, by way of defence, or in mitigation or diminution of damages, that he, the said David Gelston, was collector, and that he, the said Peter A. Schenck, was surveyor of the customs for the district of the city of New York, on the 10th day of July 1810, and before that time, and afterwards continued to be collector and surveyor as aforesaid; and

that they, the said David Gelston and Peter A. Schenck, as collector and surveyor as aforesaid, and not otherwise, did, on the said tenth day of July, in the year last aforesaid, at the port of New York, in the southern district of New York, to wit, at the city of New York, in the county of New York, and at the first ward of the said city, seize, take and detain the said ship or vessel, with her tackle, apparel and furniture, and the said 500 tons of stone ballast, 100 hogsheads of water, 130 barrels of salted provisions, and 20 hogsheads of ship-bread, according to the form of the statute in such case made and provided, and by virtue of the power and authority vested in them by the constitution and *laws of the United States, and for such [*275 cause as is herein before stated.

And the said counsel of the said defendants did then and there insist, before the said justice, on the behalf of the said defendants, that the said several matters, so offered to be proved and given in evidence on the part of the said defendants as aforesaid, ought to be admitted and allowed to be proved and given in evidence, in justification of the trespass charged against the said defendants, or in mitigation or diminution of the damages claimed by the plaintiff as aforesaid. And the said counsel for the said defendants did then and there pray the said justice, to admit and allow the said matters so offered to be proved and given in evidence, to be proved and given in evidence, in justification of the trespass charged against the said defendants, or in mitigation or diminution of the damages claimed by the plaintiff as aforesaid; but to this the counsel learned in the law of the said plaintiff objected, and did then and there insist, before the said justice, that the same ought not to be admitted or allowed to be proved or given in evidence, in justification of the trespass charged against the said defendants, and that the same ought not to be admitted or allowed to be proved or given in evidence, in mitigation or diminuation of the damages claimed by the plaintiff as aforesaid, inasmuch as the counsel of the said Goold Hoyt admitted, that the defendants had not been influenced by any malicious motives in making the said seizure, and that they had not acted with *any view or design of oppressing or injuring [*276 the plaintiff. And the said justice did then and there declare and deliver his opinion, and did then and there overrule the whole of the said evidence, so offered to be proved by the said defendants, and did declare it to be inadmissible in justification of the trespass charged against the said defendants; and after the admission so made by the counsel of the said Goold Hoyt, as aforesaid, did declare and deliver his opinion, that the said evidence ought not to be received in mitigation or diminution of the said damages, as the said admission precluded the said plaintiff from claiming any damages against the defendants, by way of punishment or smart money, and that after such admission, the plaintiff could recover only the actual damages sustained, and with that direction left the same to the said jury: and the jury aforesaid, then and there gave their verdict for the said plaintiff for $107,369.43 damages: whereupon, the said counsel for the said defendants, did then and there, on the behalf of the said defendants, except to the aforesaid opinion of the said justice, and insisted that the said several matters, so offered to be proved and given in evidence, ought to have been admitted and given in evidence, in justification of the trespass charged

against the said defendants, or in mitigation or diminution of the damages claimed by the plaintiff as aforesaid.

And inasmuch as neither the said several matters so produced and given in evidence on the part of the said plaintiff, and by the counsel of the said *277] defendants *objected to, as insufficient evidence to entitle the said plaintiff to a verdict as aforesaid, nor the said several matters so offered to be proved and given in evidence, on the part of the said defendants, in justification of the trespass charged against the said defendants, or in mitigation or diminution of the damages claimed by the plaintiff as aforesaid, appear by the record of the verdict aforesaid, the said counsel for the said defendants did then and there propose their exceptions to the opinions and decisions of the said justice, and requested him to put his seal to this bill of exceptions, containing the said several matters so produced and given in evidence on the part of the said plaintiff as aforesaid, and the said several matters so offered to be proved and given in evidence, on the part of the said defendants as aforesaid, according to the form of the statute in such case made and provided. And thereupon, the said justice, at the request of the said counsel for the said defendants, did put his seal to this bill of exceptions, on the said 15th day of November, in the year of our Lord 1815, pursuant to the statute in such case made and provided.

If either party shall require the proceedings in the district court to be set out more at length, then it is understood, that such proceedings shall be engrafted into the bill of exceptions, and form part thereof.

(Signed) AMBROSE SPENCER. [L. S.]

*278] *The bill of exceptions being carried before the supreme court of the state of New York, the exceptions were disallowed by the court. (13 Johns. 141.) The cause was then carried to the court of errors of the state, where the judgment of the supreme court of the state was affirmed (Ibid. 561), and the cause was brought to this court in the manner before stated.

March 24th, 1817. The *Attorney-General* (*Rush*), for the plaintiffs in error, argued: 1. That the special matter offered in evidence by the plaintiffs in error ought to have been admitted as a defence to the action, or at any rate, that it ought to have been admitted. The 27th section of the act of 1793 contains, in general terms, a provision that it shall be lawful for any revenue-officer to go on board of any vessel, for purposes of search and examination; and if it appear that a breach of any law has been committed, whereby a forfeiture has been incurred, to make a seizure. It has been the wise policy of the law, by enactments and decisions, co-extensive with the range of public office, to throw its shield over officers, while acting under fair and honest convictions. Thus, under the English statutes, no justice of the peace, or even constable, can be sued for anything done officially, who is not clothed with some protection more than is allowed to ordinary defendants; some relaxation of the rules of pleading, or other immunities are extended to him. It is the same with mayors, bailiffs, church-wardens, overseers, and a variety of other officers. So also, excise-officers may always plead the general issue, and give the special matter in evidence. By Stat. *279] 24 Geo. II., *no justice shall be sued for what he has done officially, until notice in writing served upon him a month beforel and; nor

then, if he tender amends. It would be easy to multiply analogous examples. Several acts of congress, passed since that of June 1794, illustrate the same legal principle. By the 11th section of the embargo act of the 25th April 1808, ch. 170, the collectors of the customs were authorized to detain any vessel ostensibly bound with a cargo to some other port of the United States, whenever, in their opinions, there existed any intention to violate or evade any of the provisions of the acts laying an embargo, until the decision of the president could be had upon the seizure. It has been repeatedly determined, that it was sufficient, under this act, for the collectors to have acted with honest convictions; and that the absence of probable cause afforded, in itself, no ground to a claim for damages. *Crowell* v. *McFadon*, 8 Cr. 94; *Otis* v. *Watkins*, 9 Ibid. 337; *Otis* v. *Walter*, 2 Wheat. 18. So also, in the law just passed, to preserve more effectually our neutral relations, a principle closely analogous has been introduced. (Act 3d March 1817, ch. 58.) It is provided by the act of the 24th February 1807, ch. 74, "that when any prosecution shall be commenced, on account of the seizure of any ship or vessel, goods, wares or merchandise, made by any collector or other officer, under any act of congress authorizing such seizure, and judgment shall be given for the claimant or claimants, if it shall appear to the court before whom such prosecution *shall be tried, that there was a reasonable cause of seizure, the said court shall cause a proper certificate or entry [*280 to be made thereof; and in such case, the claimant or claimants shall not be entitled to costs, nor shall the person who made the seizure, or the prosecutor, be liable to action, suit or judgment, on account of such seizure or prosecution: provided, that the ship or vessel, goods, wares or merchandise, be, after the judgment, forthwith returned to the claimant or claimants." Here, it appears, indeed, that if a certificate be granted, it operates as an absolute bar to an action. But it does not follow, that the refusal of a certificate is to close the ear of a court and jury to all the real merits.

It will, perhaps, be said, that the judgment of the district court restoring the vessel, and refusing the certificate, is conclusive; that it was a court of competent jurisdiction, and that, therefore, the matter which it adjudicated could not be reheard, or its propriety examined into collaterally, in any other court. We are aware of the decisions of this court upon this point, and of the English decisions upon the conclusiveness of judgments, from that in *Fernandez* v. *De Acosta*, Park on Ins. 178 (3d ed.), in the time of Lord MANSFIELD, to the more recent cases. Those, however, who have scrutinized this doctrine see plainly that, in later times, at least, though it be the law, its inconveniences appear to be sometimes felt, and its wisdom perhaps sometimes doubted. It is an intrinsic objection to the doctrine, that while it professes to look with a single eye to the binding nature of the judgment, turning away *from the merits, yet, in point of fact, the merits do, in [*281 most of the cases, get into view; so difficult is it to thrust them back, in discussions where justice only is sought. Already has the doctrine disappeared from the codes of some of the leading states in the Union; from that of Pennsylvania, by a positive statute, from that of New York, by a judicial decision. *Vandenheuvel* v. *United Ins. Co.*, 2 Johns. Cas. 451. In how many more of the states it has been broken down, is not known, but it is not supposed to be a doctrine entitled to any peculiar favor in this court. But the difference between a sentence of condemnation and of acquittal is

material. An acquittal does not ascertain facts; a conviction does; its character is positive. The former may have arisen from want of evidence; the latter must always rest upon some foundation of proof. A conviction, says Buller, is evidence of the fact; but the reverse of it is not shown by an acquittal. (Bull. N. P. 245.) Even in a common action for assault and battery, the plaintiff cannot rely upon a conviction, on an indictment for the same assault. *Jones* v. *White*, 1 Str. 68. The consequence is, that the defendant may defend himself against the suit, by going into the original facts. The plaintiffs in error asked no more below. So also, to support an action for malicious prosecution, malice in the defendant, and want of probable cause, must both concur. (Bull. N. P. 14.) If, in this action, an acquittal has been had upon the indictment, the plaintiff may still lay before
*282] the jury the evidence which was *heard on the indictment, viz., all the facts and circumstances to show that the prosecution was malicious. (Ibid.) This surely opens to the defendant the corresponding right of going into the original facts on his side. Every principle of just reasoning would seem, then, to lead to the conclusion, that the special matter ought to have gone before the jury. If it did not justify the seizure and detention, it might have served to mitigate the damages. The admission of the plaintiff's counsel, that the defendants below were not actuated by any malicious or vindictive motive, was not tantamount to hearing all the special matter, since it might, and no doubt would, have established in the minds of the jury, a far stronger claim to mitigation than the mere absence of malice. The great end, therefore, of every law-suit has been overlooked; justice has not been done. Unless the judgment below be abrogated, the defendants below, acting as innocent men, and as vigilant and meritorious public officers, are in danger of being crushed under a load of damages which could scarcely have been made more heavy, if levelled at conduct marked by the most undisputed and malignant guilt.

2. The plaintiff below, by demurring to the second plea, was precluded from all right of recovery; and that plea contains matter, which the demurrer itself admits, and which entitled the defendants below to judgment. A demurrer admits all facts that are sufficiently pleaded. What, then, are the facts set forth in this plea? Plainly these, that the American
*283] Eagle was fitted out and equipped, with intent that *she should be employed by a foreign prince or state, to wit, that part of St. Domingo governed by Petion, to cruise against another foreign prince or state, viz., against that part of St. Domingo governed by Christophe; that this was contrary to the act of the 5th of June 1794, and that the seizure thereupon took place, under orders from the president. Is not the case of the defendants below, after these admissions, completely made out? Does it lie with the plaintiff to say, that St. Domingo was not a state, or Christophe a prince? Does not the plea affirm both? Does not the demurrer admit both? What, besides, was it the object of the plea to affirm? What else did the demurrer intend to admit? The former sets them forth as fundamental facts. The latter does not deny, but admits them.

3. In contending that, within the true scope and intention of the act of the 5th of June 1794, both Petion and Christophe were to be considered foreign princes, we do not mean to depart from the reverence due to the former decisions of this court in *Rose* v. *Himely*, 4 Cranch 241, 272, but

think that there are solid grounds for distinguishing the present case from that decision. It is important, that the different branches of the government should look upon foreign nations with the same eyes, and subject them to the same rules of treatment. The decision in *Rose* v. *Himely* took place in February 1808. At that epoch, the act of congress, specifically cutting off intercourse with St. Domingo, and treating it as a dependency of France, was in full force. For the judiciary to have pronounced *this island an independent state, whilst the legislature considered it as a colony, [*284 would have disturbed the harmony of the different parts of the governing power. It would not be easy to foresee the mischiefs of such a conflict of authority and opinion. Look to the South American provinces, at this moment. Spain claims them as her lawful dominion: no power in Europe has acknowledged their independence: yet, in some of them, the authority of the once mother-country is wholly at an end. Now, what embarrassments might not result, if, after the letter of the secretary of state of the 19th of January 1816, to the Spanish minister, our courts should pronounce Buenos Ayres, for example, to be rightfully in its full colonial dependence upon Spain. Vattel's authority upon this subject is decisive. According to him, we are to look to the state of things *de facto*, taking each party to be in the right. Vattel, lib. 3, ch. 3, § 18. The rule laid down in *Rose* v. *Himely*, that such language was to be addressed to sovereigns, not courts, may have been applicable to the condition in which St. Domingo *then* was. It cannot, however, be conceded, that it is of constant and universal application. The progress of events may create a state of things, of which, as they impress their convictions upon mankind, courts too will take notice. The Netherlands waged a war of more than half a century with Spain; Spain never ceased to call it a rebellion; but what were the sympathies, what the conduct of protestant Europe, towards them, during the principal part of the time? What that of England, in particular, who did not *scruple to form treaties with them, while Spain was still denouncing them as [*285 heretics and insurgents? The fact being now palpable to the world, that St. Domingo is independent of all connection with France, repudiating her authority, and spurning her power, this positive state of independence *de facto* may, at length, well be taken to stand in the place of a formal acknowledgment of it by governments: and if courts of justice are to wait until France relinquishes her claim, that day may be indefinite indeed. The act of congress, which specifically interdicted intercourse with St. Domingo, considered as a colony of France, expired in April 1808. It was in full force at the time of the decision in *Rose* v. *Himely*, which constitutes another marked distinction between that case and the present. As to the condemnations which it may be alleged took place under the general non-intercourse laws, passed afterwards, of vessels coming from St. Domingo, upon the footing of its belonging to France, no inference against the argument can be hence deduced. In the first place, those laws left it wholly indefinite as to what colonies did or did not belong to France; they were couched in general terms only. They prohibited all intercourse with Great Britain and France, and their dependencies, without undertaking to designate, in any case, what the dependencies of either were. In the next place, so far as is known, it appears, that the government remitted the forfeitures, in all such cases of condemnation, thereby manifesting its opinion, if any inference is

to be drawn, that time and the progress of events had at length taken this
*286] island out of the true *spirit and meaning of those general laws; and that, as the nations of Europe were trading with it as an independent island, the citizens of the United States might fairly be permitted to do the same.

4. A leading object of the act of 1794 was, to preserve the peace as well as neutrality of the United States. Thus, then, although St. Domingo might not be a sovereign state, to all intents and purposes (which it is not necessary to contend), it was sufficiently independent, whether as to commerce or power, to fall within the mischiefs, and be embraced by the penalties, of the law in question.

Hoffman, and *D. B. Ogden*, for the defendant in error.—1. This court is not competent to take cognisance of this cause, under the 25th section of the judiciary act of 1789, ch. 20. The court has appellate jurisdiction only, from the final judgment or decree of the highest court of law or equity of the state, in certain specified cases. But this jurisdiction cannot be here exercised, because the highest court of law and equity of the state of New York, to whom the writ of error is directed, is no longer in possession of the cause, but has remitted the record and judgment to the supreme court of the state, to whom the writ of error is not, and cannot be directed. The agreement of the parties, under which the record is now before this court, reserves this question to be argued. It does not determine the *return* to be regular and valid, but only that the transcript shall have the same effect as if *annexed* to the writ of error. But even supposing the cause could be re-
*287] examined *upon a return to the writ of error, by the supreme court of the state, the main foundation of appellate jurisdiction in this court is wanting. The judgment of the state court does not decide *against* the title, right, privilege or exemption set up by the defendants below, under the act of congress of 1794, ch. 50; on the contrary, the state court has refused to give any construction whatever to the act of 1794, and to decide whether, under the facts of the case, it did or did not afford the defendants below, a legal defence to the action; because, the parties defendant, having declined to argue the demurrer in the supreme court, the court of errors refused, upon grounds of state law and state practice, to hear them in that court.(*a*) Parties litigant are bound to exercise their rights, according to the law and practice of the *forum* where they attempt to assert them. If they do not assert them, according to the rules prescribed by the *lex fori*, a decision against the party is not a decision against the right set up by him; but only a decision that he has not claimed that right, according to the local law and practice.

2. If, however, the court should be of opinion, that the cause is regularly before it, then we contend, that the testimony offered by the defendants below, upon the trial at *nisi prius*, and which was overruled by the judge, was properly excluded. They did not offer any evidence to show, that the vessel had been, or was intended to be engaged in any illegal trade or
*288] employment. The only law to which *the testimony offered could have any reference, is an act of congress, which was passed June

(*a*) For these grounds, see the opinion of Chancellor KENT in this cause, in the court of errors, 13 Johns. 576.

1794, entitled "an act, in addition to an act, for the punishment of certain crimes against the United States," made perpetual by a subsequent act. By the third section of the first-mentioned act, it is enacted, "that if any person shall, within any of the ports, harbors, bays, rivers or other waters of the United States, fit out and arm, or attempt to fit out and arm, or procure to be fitted out and armed, or shall knowingly be concerned in the furnishing, fitting out and arming, of any ship or vessel, with intent that such ship or vessel shall be employed in the service of any foreign prince or state, to cruise or commit hostilities upon the subjects, citizens or property of any other foreign prince or state, with whom the United States are at peace, &c., every such ship or vessel, with her tackle, apparel and furniture, together with all materials, arms, ammunition and stores which may have been procured for the building and equipment thereof, shall be forfeited, one-half to any person who shall give information of the offence, and the other half to the use of the United States." The defendants below merely offered to prove, that the ship was fitted out with intent that she "should be employed in the service of that part of the island of St. Domingo which was then under the government of Petion, to cruise and commit hostilities upon the subjects, citizens and property of that part of the island of St. Domingo, which was then under the govermene of Christophe;" but did not offer to show that either of these parts of the island was *a foreign state, or that either [*289
Petion or Christophe were foreign princes, with whom the United States were at peace. And even if they had proved these facts, the evidence would have been perfectly immaterial and irrelevant: because, in the words of this court, "it is for governments to decide, whether they will consider St. Domingo as an independent nation, and until such decision shall be made, or France shall relinquish her claim, courts of justice must consider the ancient state of things as remaining unaltered, and the sovereign power of France over that colony, as still subsisting." *Rose* v. *Himely*, 4 Cr. 292. The same principle has also been recognised by the highest British tribunals, both as applicable to the case of St. Domingo, and to other revolutions of states not recognised by the government of the country where the tribunal is sitting that is required to take notice of them. Edw. Adm. 1, and app'x. A; *City of Berne* v. *Bank of England*, 9 Ves. 347. What would be the absurd consequences of leaving each tribunal to settle this question, according to the information it might possess? Nothing can be more opposite and irreconcilable than the views given of the situation of St. Domingo by different writers and travellers. How then should a court decide, which has no other sources of information? The government is informed by its diplomatic agents: it has a view of the whole ground, and can judge what considerations ought to influence the decision of this question of complicated policy. Our foreign relations are, by necessary implication, *delegated to con- [*290
gress and the executive, by the constitution. Neither Petion nor Christophe have ever had any secure, firm possession of the sovereignty in St. Domingo. They have not only been contending with each other, but they have had rivals who have attempted to establish adverse claims to different parts of the island by the sword. The defendants below have themselves acted in their official conduct on these principles. In the year 1809, they seized and prosecuted in the district court, the James and the Lynx, two vessels which had come with cargoes from St. Domingo to New York

contrary to the provisions of the non-intercourse acts, forbidding all commercial intercourse between the United States and Great Britain, France and their dependencies. In these cases, they considered St. Domingo as a colony of France; and whilst the suits were depending, the ship now in controversy, was seized by them, under an allegation that she was intended for the service of an independent state, which independent state was the same St. Domingo they had just before considered as a French dependency.

3. The testimony offered by the defendants below could not be admitted, because the district court was the proper tribunal to determine, whether the vessel in question was or was not liable to seizure and forfeiture for the causes alleged. It having been decided in that court, that she was so liable, its judgment is conclusive, and precludes every tribunal, unless upon appeal, from re-examining the grounds of the decision. The authorities on this
*291] point are innumerable, *and flowing in a uniform current.(*a*) As to foreign sentences, it is settled in this court, that a sentence of condemnation, by a competent court, having jurisdiction over the subject-matmer of its judgment, is conclusive as to the title of the thing claimed under it. *Rose* v. *Himely*, 4 Cr. 241. And that the sentence of a prize-court, condemning a vessel for breach of a blockade, is conclusive evidence of the fact as between the insurer and assured. *Croudson* v. *Leonard*, 4 Cr. 434. But what is still more pertinent to the present case, the court has determined, that the question, under a seizure for a breach of the laws of the United States, whether a forfeiture has been actually incurred, belongs exclusively to the courts of the United States, and it depends upon their final decree, whether the seizure is to be deemed rightful or tortious. *Slocum* v. *Mayberry*, 1 Wheat. 1. The distinction which has been suggested between the conclusiveness of condemnations and of acquittals, has been considered in several of the authorities, and it is now perfectly settled, that no such distinction exists. A condemnation may be founded on the oath of the seizing
*292] party; and though, by *the laws of the United States, he cannot share in the forfeiture, if he becomes a witness, still he is interested to protect himself by a condemnation. Shall, then, a condemnation, founded on such testimony, be conclusive, and an acquittal not? The defendants, themselves, applied for time to plead, until the district court should decide, on the ground that its decision would be conclusive. (See 8 Johns. 179.)

4. The testimony offered by the defendants below could not be admitted in mitigation of damages: because, if admitted, it would only be to show that there was reasonable cause for the seizure, and consequently, that the defendants acted without malice, or any intention to oppress the plaintiff below. But the question whether there was or was not reasonable cause of seizure, is a question which is expressly submitted to the district court by the statutes of the United States,(*b*) and over which this court has declared

(*a*) Vandenheuvel *v.* United States Ins. Co., 2 Johns. Cas. 127, and the authorities there cited. The authorities collected in the same case, 2 Caines' Cases 217, and by Mr. Chief Justice (now Chancellor) KENT, in his opinion in Ludlow *v.* Dale, Id. 217; Wheaton on Capt. 274, 278; Peake's Law of Evidence (3d London ed.) 78, 79, and the cases there cited in a note; Cooke *v.* Sholl, 5 T. R. 255; Dane *v.* Degbergh, Bull. N. P. 244. Opinion of Mr. Justice JOHNSON, in Rose *v.* Himely, in the circuit court, 4 Cranch 508, app'x, note C; 12 Vin. Abr. 95, Evid. A. *b*, 22.

(*b*) Act of the 24th February 1807, ch. 74.

the district court had exclusive cognisance. A certificate of reasonable cause for the seizure having been denied by the district court, every other tribunal is as much precluded, except on appeal, from examining whether there was or was not reasonable cause for the seizure, as they are from examining whether there was or was not sufficient cause of forfeiture. The plaintiff below admitted upon the trial, that the defendants had not been influenced by any malicious motives in making the seizure, and that they had not acted with any view or design of oppressing or injuring the plaintiff. And the judge who tried the cause at *nisi prius* *charged the jury, that [*293 this admission precluded the plaintiff from claiming vindictive damages, and the jury rendered a verdict only for the actual damages, as proved by uncontradicted testimony. Where a certificate of reasonable cause is refused, or not granted, a party making an illegal seizure, can be in no better state than he would be, if the law had made no provision respecting a certificate. It is well settled, that probable cause is no justification of an illegal seizure, unless it be made a justification by statute. Nor can evidence of probable cause be received, to mitigate the damages, in cases where there is a disclaimer as to everything but actual damages. For whether there was, or was not, malice or probable cause, the actual damages sustained must be recovered for an illegal seizure, or for any other trespass, if anything whatever is recovered.

5. The second and third pleas of the defendant below are manifestly bad, on general demurrer. 1st. Petion and Christophe were not foreign princes, nor their territories foreign states, and consequently, a seizure for fitting out the vessel to be employed in their service could not be justified.(*a*) 2d. The president had no authority by law to order the seizure. The 7th section of the act of 1794 does not apply to this cause. If it did, the president's order can only be a justification, when applied to an illegal act. If no illegal act be proved, there can be no justification, under the order. Were it otherwise, the president would be a despot. The 7th section of *the act provides, "that in every case in which a vessel shall be fitted [*294 out or armed, or attempted so to be fitted out or armed, or in which the force of any vessel of war, cruiser or other armed vessel, shall be increased or augumented, or in which any military expedition or enterprise shall be begun or set on foot, contrary to the prohibitions and provisions of this act; and in every case of the capture of a ship or vessel, within the jurisdiction or protection of the United States, as above defined, and in every case in which any process issuing out of any court of the United States, shall be disobeyed or resisted by any person or persons having the custody of any vessel of war, cruiser or other armed vessel, of any foreign prince or state, or of the subjects or citizens of such prince or state, in every such case, it shall be lawful for the president of the United States, or such other person as he shall have empowered for that purpose, to employ such part of the land or naval forces of the United States, or of the militia thereof, as shall be judged necessary, for the purpose of taking possession of, and detaining any such ship or vessel with her prize or prizes, if any, in order to the execution of the prohibitions and penalties of this act, and to the restoring such prize or prizes, in the cases in which restoration shall have been

(*a*) See the authorities, cited *ante*, p. 289.

adjudged, and also for the purpose of preventing the carrying on of any such expedition or enterprise, from the territories of the United States, against the territories or dominions of a foreign prince or state with whom the United States are at peace." Under this provision, the president could
*295] not authorize the defendants below to seize. He *could only employ the army and navy, or the militia, for that purpose. He could only authorize an arrest or detainment, not a seizure, which is a taking and carrying away; he could only authorize a taking possession of, and detaining the vessel, in order to the execution of the penalties and prohibitions of the act. The vessel might have been libelled, and taken into the custody of the officers of the court; but the defendants below have not averred themselves to be revenue-officers, and as such, authorized to seize by the act of 1790, ch. 153. 3d. The 2d plea is not a bar in the court where it was pleaded. What could the plaintiff below have replied to this plea? That there was no forfeiture as alleged? But the state court has no authority to try the question of forfeiture, under the laws of the United States. The courts of the United States have exclusive jurisdiction of that question, and their decision is final and conclusive upon every other tribunal. Or suppose, that the plaintiff had replied, that Petion and Christophe were not independent princes. No municipal court whatever has power to determine that question. The executive government is alone competent to recognise new states arising in the world, and it would be extremely inconvenient and embarrassing, in this age of revolutions, for courts and juries to interfere in the decision of a question of such delicate and complicated policy, depending upon a variety of facts which they cannot know, and of considerations which they cannot notice. Again, if the plaintiff had replied, that the president had given no such instructions as mentioned in the plea, the replication
*296] *would have been immaterial, and a ground of demurrer. 4th. Neither of the pleas aver, that the ship was actually forfeited, but only that it was "seized *as* forfeited," which is not an equivalent averment. The case of *Wilkins* v. *Despard*, 5 T. R. 112, where a similar plea was pleaded, is distinguishable. That was a seizure under the British navigation act, 12 Car. II., ch. 18, § 1, by which the legality of the seizure, and the question of forfeiture itself, might be tried in any court of record in the British dominions, and consequently, in the court itself, where the plea was pleaded. 5th. The 3d section of the act of 1794, after specifying the offences meant to be punished, provides, that "every such person, so offending, shall, upon conviction, be adjudged guilty of a high misdemeanor, and shall be fined and imprisoned, at the discretion of the court in which the conviction shall be had, so that the fine to be imposed shall in no case be more than $5000, and the term of imprisonment shall not exceed three years; and every such ship or vessel, her tackle, apparel and furniture, together with all materials, arms, ammunition and stores, which may have been procured for the building and equipment thereof, shall be forfeited, one-half to the use of any person who shall give information of the offence, and the other half to the use of the United States." By every just rule of
*297] his construction, the proceeding by indictment against the offender, and conviction, must precede *the suit *in rem*, and the forfeiture of the vessel. The phraseology of the act is different from all the other

statutes authorizing seizures and creating forfeitures. By those statutes, the revenue-officers have power to seize and proceed *in rem* against the thing seized, as forfeited, independent of any criminal proceeding against the offending individual. By this act, the forfeiture of the thing is made to depend upon the conviction of the person, and the president alone has power to seize, and that only as a precautionary measure, to prevent an intended violation of the laws. 6th. The third plea is particularly defective, in omitting to state, as is done in the second plea, what princes or foreign states were intended. It merely alleges, that the vessel was fitted out with intent to be "employed in the service of some foreign state, to commit hostilities upon the subjects of another foreign state, with which the United States were then at peace." It is a sacred rule of pleading, that where an offence is charged, or a forfeiture is claimed, the facts must be so alleged as that the court may judge whether there has been an offence committed or forfeiture incurred.(*a*) To so vague an allegation as this, it would be impossible for the plaintiff below to reply.

Baldwin, for the plaintiffs in error, in reply, insisted on the validity of the special pleas. The defendants below were not bound to answer the conversion, *because the trespass was complete without it. This defect, if any, ought to have been newly assigned by the plaintiff below, if he intended to have taken advantage of it. *Taylor* v. *Cole*, 3 T. R. 292. The forfeiture was well pleaded. The offence being committed, the forfeiture instantly attaches. *The Mars*, 8 Cr. 417. The plea here states, that the ship was seized "as forfeited," in the same manner with that which was held good in *Wilkins* v. *Despard*, 5 T. R. 112, and it alleges the offence in the words of the statute. An allegation that the seizure was made for a violation of the law, that the thing seized was taken as forfeited, is equivalent to an allegation that it was actually forfeited. Nor was it necessary to aver, that the seizure was made by a military or naval force. The 7th section of the act of 1794, evidently contemplates the employment of that description of force, only when, in the opinion of the president, it might become necessary to carry into effect the law. In other cases, the seizure might be made by the ordinary means of the revenue-officer. Nor is a conviction, on an indictment or information *in personam* necessary, before the proceedings *in rem* are commenced. None of the objections to the special pleas are available on general demurrer. [*298

The plaintiff below should have replied, that Petion and Christophe were not independent princes or states, and so have had that question tried as a question of fact. The existence of new states in the world may commence in various modes. 1st. Colonies may become independent *of the parent state, by means of force, and an acquiescence in the effects of that force on the part of the mother-country, for a sufficient length of time, to indicate a relinquishment of all hopes of recovering possession of the dominion. The pride of princes and nations will not always permit them openly and expressly to recognise the independence of rebellious subjects, [*299

(*a*) Com. Dig. tit. Action on Stat. A, 3, pl. 1; Davy v. Baker, 4 Burr. 2471; Rex v. Robe, 2 Str. 999; 2 Saund. 379; Radford v. McIntosh, 3 T. R. 636.

until long after they have relinquished all hope of subduing them. When the case of *Rose* v. *Himely* was determined, a war *de facto* existed between France and St. Domingo; and the former, so far from relinquishing her sovereignty over the latter, was actually attempting so assert it by force of arms. A long period of time has since elapsed, and the attempt has not been renewed. The people of the island have settled down under governments, the conduct of which is a pledge of their stability, and whose policy and institutions would do honor to more civilized and ancient communities. 2d. The existence of new states may be recognised by the supreme power of every country, in whose courts of justice the question of their independence may arise, and that, even while the civil war still rages between the new people and its former sovereign. When thus recognised by the legislative or executive authority of other countries, the tribunals of those countries are bound to take notice of their existence as independent states. This recognition may be made in various modes: by treaty; by a legislative act; by an executive proclamation; by sending to, or receiving from the new state, a public minister or other diplomatic agent. 3d. Their independence may
*300] also *be recognised by a treaty of cession from the parent-country. This treaty may not have become a public historical fact, of which courts of justice will take notice, without other evidence than its own notoriety. It may be deposited in the archives of a foreign, or of our own government. It may require to be proved in the same manner as foreign written laws are proved. In any of these views, the question as to the independence of St. Domingo is a question of fact, to be tried by the jury, and consequently, the plaintiff ought to have replied, that Petion and Christophe were not independent princes or states, as alleged in the defendants' pleas. The instruction of the president, in this very case, implies, that he recognised the independence of the island; the instruction could not otherwise have been legally given.

As to the conclusiveness of the decree of restitution in the district court, it is founded on principles which push the doctrine of the conclusiveness of sentences, to a degree of extravagance irreconcilable with reason and common sense. That every sentence of a court having jurisdiction of the subject-matter, so long as it remains unreversed by the appellate tribunal, is conclusive as to the title of the thing claimed under it, is conceded. But according to the jurisprudence of the state of New York, the sentences of foreign courts of admiralty are held not to be conclusive, as to other persons than those claiming title to the property; *Vandenheuvel* v. *United Ins. Co.*, 2 Caines' Cas. 217; s. c. 1 Johns. Cas. 127, 451; and the conclusiveness of
*301] the sentences of *domestic courts of peculiar and exclusive jurisdiction depends upon precisely the same principle. But supposing a sentence of condemnation to be conclusive, for all purposes, and against all persons; it does not follow, that a sentence of restitution ought to have the same effect. A judgment of acquittal is of a negative quality merely, and ascertains no precise facts. Bull. N. P. 245; Peake's Evid. 48; 1 Harg. Law Tracts 742. It only shows that sufficient evidence did not appear to the court to authorize a condemnation. Why is a decree of condemnation held to be conclusive? Because it is a basis of the title to the thing condemned. But an acquittal forms no part of the title to the thing acquitted, which is restored to the former proprietor, who holds it by the same title as

before. The case said to have been decided before Baron PRICE, in the year 1716, 12 Vin. Abr. 95, Evid. A, *b*, 22, is not pertinent. The elementary writers do not consider this as an adjudged point in any of the cases; and their authority, which is of great weight, makes a distinction, founded in reason and the nature of things, between a sentence of condemnation and a sentence of acquittal. Peake's Evid. 48; Phillips on Evid. 228–29; 2 Evans' Pothier 354. All the authorities confine the conclusiveness of the *res judicata* to parties and privies; the defendants below were neither. Mr. Evans, in commenting upon the decision of Baron PRICE, reported in Viner, says that, "upon principle, *I should conceive that the opposite determination would be more correct, as such an acquittal would be warranted, [*302 upon the mere negative ground, that the crown had not adduced sufficient evidence to support the seizure; and an individual, having a collateral interest in supporting the legality of the seizure, is not a concurrent party with the crown in supporting the condemnation, and asserting the claim of property on the one side, in the same manner as every person having an interest in opposing such condemnation, is, in contemplation of law, a sufficient party on the other." 2 Evans' Pothier 354. So, in this case, the defendants below were not concurrent parties with the United States in supporting the condemnation. It does not appear that the defendants were informers, and so entitled to one-half the forfeiture: the prosecution was carried on in the name of the government and by its law-officers; the defendants had no control over it, and could not appeal from the decision of the district court. They ought not, therefore, to be concluded by it.

February 23d, 1818. The cause was again argued, at the present term, by *Baldwin*, for the plaintiffs in error, and by *D. B. Ogden* and by *Jones*, for the defendant in error.

February 27th. STORY, Justice, delivered the opinion of the court.—This is a writ of error to the highest court of law of the state of New York; and the questions which are re-examinable upon the record in this [*303 *court are such only as come within the purview of the 25th section of the judiciary act of 1789, ch. 20.

But a preliminary question has been made, which must be discussed, before proceeding to consider the merits of the cause. It is contended, that the record is not, and cannot be brought, before this court.

By the judicial system of the state of New York, the decisions of their supreme court are revised and corrected in a court of errors, after which, the record is returned to the supreme court, where the judgment, as corrected, is entered, and where the record remains. In this case, the writ of error was received by the court of errors, after the record had been transmitted to the supreme court whose judgment was affirmed. It is contended, that the record, being no longer in the court of last resort in the state, can, by no process, be removed into this court.

The judiciary act allows the party who thinks himself aggrieved by the decision of any inferior court, five years, within which he may sue out his writ of error, and bring his cause into this court. The same rule applies to judgments and decrees of a state court, in cases within the jurisdiction of this court. As the constitutional jurisdiction of the courts of the

Union cannot be affected by any regulation which a state may make of its own judicial system, the only inquiry will be, whether the judiciary act has been so framed as to embrace this case. The words of the act are, "that a *304] final judgment or decree in any suit in the highest court of law or *equity of a state in which a decision could be had, where is drawn in question," &c., "may be re-examined, and reversed or affirmed, in the supreme court of the United States, upon a writ of error, the citation being signed," &c. The act does not prescribe the tribunal to which the writ of error shall be directed. It must be directed, either to that tribunal which can execute it; to that in which the record and judgment to be examined are deposited, or to that whose judgment is to be examined, although from its structure it may have been rendered incapable of performing the act required by the writ. Since the law requires a thing to be done, and gives the writ of error as the means by which it is to be done, without prescribing, in this particular, the manner in which the writ is to be used, it appears to the court, to be perfectly clear, that the writ must be so used as to effect the object. It may, then, be directed to either court in which the record and judgment on which it is to act may be found. The judgment to be examined must be that of the highest court of the state having cognisance of the case, but the record of that judgment may be brought from any court in which it may be legally deposited, and in which it may be found by the writ. In this case, the writ was directed to the court of errors, which, having parted with the record, could not execute it. It was then presented to the supreme court; but being directed to the court of errors, could not regularly be executed by that court. In this state of things, the parties *305] consented to waive all objections *to the direction of the writ, and to consider the record as properly brought up, if, in the opinion of this court, it could be now properly brought up on a writ of error directed to the supreme court of New York. The court being of opinion, that this may be done, the case stands as if the writ of error had been properly directed.

The original suit was brought by the defendant in error, against the plaintiffs in error, for an alleged trespass, for taking and carrying away, and converting to their own use, the ship American Eagle, and her appurtenances, and certain ballast and articles of provisions, &c., the property of the defendant in error. This is the substance of the declaration, although there are some differences in alleging the *tort*, in the different counts. The original defendants pleaded, in the first place, the general issue, not guilty, to the whole declaration; and then two special pleas. The first special plea, in substance, alleges, that the said ship was attempted to be fitted out and armed, and that the ballast and provisions were procured for the equipment of the said ship, and were put on board of the said ship as a part of her said equipment, with intent that the said ship should be employed in the service of a foreign state, to wit, of that part of the island of St. Domingo which was then under the government of Petion, to commit hostilities upon the subjects of another foreign state, with which the United States were then at peace, to wit, of that part of the island of St. Domingo which was then under the government of Christophe, contrary to the form of the statute *306] in *such case made and provided; and that the original defendants, by virtue of the power and authority, and in pursuance of the instructions and directions of the president of the United States, seized the said

ship, &c., as forfeited to the use of the United States, according to the statute aforesaid, &c. The second special plea is like the first, except that it does not state that the ship was seized as forfeited, but alleges that the ship was taken possession of and detained, under the instructions of the president of the United States, in order to the execution of the prohibition and penalties of the act in such case made and provided; and except that it omits the allegations under the *videlicets* in the first plea, specifying the foreign state by or against whom the said ship was to be employed. To these pleas, there is a general demurrer, and joinder in demurrer, upon which the state court gave judgment in favor of the original plaintiff.

Upon the trial of the general issue, a bill of exceptions was taken to the opinion of the court. By that bill of exceptions, among other things, it appears, that the original plaintiff, at the trial, gave in evidence, that at the time of the seizure, the ship was in his actual full and peaceable possession; that the ship, upon the seizure, had been duly libelled for the alleged offence in the district court of New York; that the original plaintiff appeared and duly claimed the said ship; and upon the trial, she was duly acquitted, and ordered to be restored to the original plaintiff by the district court; and that a certificate of reasonable cause for the seizure of the said ship had been denied. The plaintiff then gave in evidence, *that the value of the ship, at the time of her seizure, was $100,000; and that the said [*307 Schenck seized and took possession of the said ship, by the written directions of the said Gelston; but no other proof was offered by the plaintiff, at that time, of any right or title in the said plaintiff to the said ship; and here the original plaintiff rested his cause. The original defendants then insisted before the court, that the said several matters, so produced and given in evidence on the part of the original plaintiff, were not sufficient to entitle him to a verdict, and prayed the court so to pronounce, and to nonsuit the plaintiff. But the court refused the application, and declared, that the said several matters so produced and given in evidence, were sufficient to entitle the plaintiff to a verdict, and that he ought not to be nonsuited. To which opinion, the original defendants then excepted: and the original plaintiff then gave in evidence, that he purchased the said ship of James Gillespie, who had purchased her of John R. Livingston and Isaac Clason, the owners thereof, and that in pursuance of such purchase, the said Gillespie had delivered full and complete possession of the said ship, &c., to the original plaintiff, before the taking thereof by the original defendants.

The original defendants (having given previous notice of the special matter of defence to be given in evidence on the trial, under the general issue, according to the laws of New York) offered to prove and give in evidence, by way of defence, and in mitigation of damages, the same matter of forfeiture alleged in their first special plea, with the additional fact that *the said Gelston was collector, and the said Schenck was surveyor of [*308 the customs of the district of New York, and as such, and not otherwise, made the seizure of the ship, &c. And the original defendants did, thereupon, insist, that the said several matters, so offered to be proved and given in evidence, ought to be admitted in justification of the trespass charged against the defendants, or in mitigation of the damages claimed by the plaintiff, and prayed the court so to admit it. But the counsel for the plaintiff, admitting that the defendants had not been influenced by any

malicious motive in making the said seizure, and that they had not acted with any view or design of oppressing or injuring the plaintiff, the court overruled the whole of the said evidence, so offered to be proved by the original defendants, and did declare it to be inadmissible, in justification of the trespass charged against the defendants; and after the admission so made by the original plaintiff's counsel, that the said evidence ought not to be received in mitigation or diminution of the said damages, as the said admission precluded the plaintiff from claiming any damages, by way of punishment or smart money, and that after such admission, the plaintiff could only recover the damages actually sustained, and with that direction, left the cause to the jury.

From this summary of the pleadings, and of the facts in controversy at the trial, it is apparent, that this court has appellate jurisdiction of this cause, only so far as is drawn in question the validity of an authority exercised under the United States, and the decision is against the validity thereof, and so far as *is drawn in question the construction of some clause in a statute of the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by the original defendants, for to such questions (so far as respects this case), the 25th section of the judiciary act has expressly restricted our examination. Whether such a restriction be not inconsistent with sound public policy, and does not materially impair the rights of other parties, as well as of the United States, is an inquiry deserving of the most serious attention of the legislature. We have nothing to do, but to expound the law as we find it; the defects of the system must be remedied by another department of the government.

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The cause will be first considered, in reference to the bill of exceptions. In respect to the proof of the original plaintiff's cause of action, and the opinion of the court, that such proof was sufficient to entitle him to a verdict, no error has been shown upon the argument; and certainly none is perceived by this court. If, however, there were any error in that opinion, we could not re-examine it, for it is not within the purview of the statute. It does not draw in question any authority exercised under the United States, nor the construction of any statute of the United States.

In respect to the rejection of the evidence offered by the original defendants, to prove the forfeiture, and their right of seizure, there can be no doubt, that this court has appellate jurisdiction, if, by law, that evidence ought to have been admitted, in justification of the trespass charged on the original defendants; for *it involves the construction of a statute of, and an authority derived from, and exercised under, the United States.

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In order to establish the admissibility of the evidence offered by the defendants, it is necessary for them to sustain the affirmative of the following propositions: 1. That a forfeiture had been actually incurred under the statute of 1794, ch. 50. 2. That it was competent for a state court of common law to entertain and decide the question of forfeiture. 3. That the sentence of acquittal in the district court was not conclusive upon the question of foreiture. 4. That the defendants, as officers of the customs, had a right to make the seizure.

Upon the last point, there does not seem to be much room for doubt. At common law, any person may, at his peril, seize for a forfeiture to the

government; and if the government adopt his seizure, and the property is condemned, he will be completely justified; and it is not necessary, to sustain the seizure or justify the condemnation, that the party seizing shall be entitled to any part of the forfeiture. (Hale on the Customs, Harg. Tracts, 227; *Roe* v. *Roe*, Hardr. 185; *Malden* v. *Bartlett*, Parker 105; though *Horne* v. *Boosey*, 2 Str. 952, seems *contrà*.) And if the party be entitled to any part of the forfeiture (as the informer, under the statute of 1794, ch. 50, is, by the express provision of the law), there can be no doubt, that he is entitled in that character to seize. (*Robert* v. *Witherhead*, 12 Mod. 92.) In the absence of all positive authority, it might be proper to resort to these principles, in aid of *the manifest purposes of the law. But there are express statutable provisions, which directly apply to the present [*311 case. The act of the 2d of March 1799, ch. 128, § 70, makes it the duty of the several officers of the customs, to make seizure of all vessels and goods liable to seizure by virtue of any act of the United States respecting the revenue; and assuming the statute of 1794, ch. 50, not to be a revenue law, within the meaning of this clause, still the case falls within the broader language of the act of the 18th of February 1793, ch. 8, § 27, which authorizes the officers of the revenue to make seizure of any ship or goods, where any breach of the laws of the United States has been committed. Upon the general principle, then, which has been above stated, and upon the express enactment of the statute, the defendants, supposing there to have been an actual forfeiture, might justify themselves in the seizure. There is this strong additional reason in support of the position, that the forfeiture must be deemed to attach, at the moment of the commission of the offence, and consequently, from that moment, the title of the plaintiff would be completely divested, so that he could maintain no action for the subsequent seizure. This is the doctrine of the English courts, and it has been recognised and enforced in this court, upon very solemn argument. (*United States* v. 1960 *Bags of Coffee*, 8 Cranch 398; *The Mars*, Ibid. 417; *Robert* v. *Witherhead*, 12 Mod. 92; 1 Salk. 223; *Wilkins* v. *Despard*, 5 T. R. 112.)

In the next place, can a state court of common law, entertain and decide the question of forfeiture *in this case. This is a question of vast practical importance; but in our judgment, of no intrinsic legal dif- [*312 ficulty. By the constitution, the judicial power of the United States extends to all cases of law and equity, arising under the constitution, laws and treaties of the United States, and to all cases of admiralty and maritime jurisdiction; and by the judiciary act of 1789, ch. 20, § 9, the district courts are invested with exclusive original cognisance of all civil causes of admiralty and maritime jurisdiction, and of all seizures on land and water, and of all suits for penalties and forfeitures, incurred under the laws of the United States. This is a seizure for a forfeiture under the laws of the United States, and consequently, the right to decide upon the same, by the very terms of the statute, exclusively belongs to the proper court of the United States; and it depends upon its final decree, proceeding *in rem*, whether the seizure is to be adjudged rightful or tortious. If a sentence of condemnation be pronounced, it is conclusive, that a forfeiture is incurred; if a sentence of acquittal, it is equally conclusive against the forfeiture; and in either case, the question cannot be litigated in another *forum*. This was the doctrine asserted by this court, in the case of *Slocum* v. *Mayberry* (2 Wheat. 1),

after very deliberate consideration; and to that doctrine we unanimously adhere.

The reasonableness of this doctrine results from the very nature of proceedings *in rem*. All persons having an interest in the subject-matter, whether as seizing officers, or informers, or claimants, are parties, or may be parties, to such suits, so far as their interest *extends. The decree of the court acts upon the thing in controversy, and settles the title of the property itself, the right of seizure, and the question of forfeiture. If its decree were not binding upon all the world, upon the points which it professes to decide, the consequences would be most mischievous to the public. In case of condemnation, no good title to the property could be conveyed, and no justification of the seizure could be asserted under its protection. In case of acquittal, a new seizure might be made by any other persons, *toties quoties*, for the same offence, and the claimant be loaded with ruinous costs and expenses. This reasoning applies to the decree of a court having competent jurisdiction of the cause, although it may not be exclusive. But it applies with greater force to a court of exclusive jurisdiction; since an attempt to re-examine its decree, or deny its conclusiveness, is a manifest violation of its exclusive authority. It is doing that indirectly, which the law itself prohibits to be done directly. It is, in effect, impeaching collaterally, a sentence which the law has pronounced to be valid, until vacated or reversed on appeal by a superior tribunal.

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The argument against this doctrine, which has been urged at the bar, is, that an action of trespass will, in case of a seizure, lie in a state court of common law, and therefore, the defendant must have a right to protect himself, by pleading the fact of forfeiture in his defence. But at what time and under what circumstances, will an action of trespass lie? If the action be commenced, while the proceedings *in rem* for the supposed forfeiture are pending in the *proper court of the United States, it is commenced too soon; for, until a final decree, it cannot be ascertained, whether it be a trespass or not, since that decree can alone decide, whether the taking be rightful or tortious. The pendency of the suit *in rem* would be a good plea in abatement, or a temporary bar of the action, for it would establish that no good cause of action then existed. If the action be commenced after a decree of condemnation, or after an acquittal, and there be a certificate of reasonable cause of seizure, then, in the former case, by the general law, and in the latter case, by the special enactment of the statute of the 25th of April 1810, ch. 64, § 1, the decree and certificate are each good bars to the action. But if there be a decree of acquittal, and a denial of such certificate, then the seizure is established conclusively to be tortious, and the party is entitled to his full damages for the injury.

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The cases also of *Wilkins* v. *Despard* (5 T. R. 112) and *Robert* v. *Witherhead* (12 Mod. 92, 1 Salk. 323), have been relied on, to show that a court of common law may entertain the question of forfeiture, notwithstanding the exclusive jurisdiction of the exchequer *in rem*. But these cases do not sustain the argument. They were both founded on the act of navigation, 12 Car. II., ch. 18, § 1, which, among other things, enacts, that one-third of the forfeiture shall go to him "who shall seize, inform or sue for the same, in any court of record." So that it is apparent, that in respect to forfeitures under this statute, the exchequer had not an exclusive juris-

diction, but that the other courts of common law had *at least a concurrent jurisdiction. And if these cases did not admit of this obvious distinction, certainly, they could not be admitted to govern this court, in ascertaining a jurisdiction vested by the constitution and laws of the United States exclusively in their own courts.

It is, therefore, clearly our opinion, that a state court has no legal authority to entertain the question of forfeiture in this case; and that it exclusively belonged to the cognisance of the proper court of the United States. Indeed, no principle of general law seems better settled, than that the decision of a court of a peculiar and exclusive jurisdiction must be completely binding upon the judgment of every other court, in which the same subject-matter comes incidentally in controversy. It is familiarly known, in its application to the sentences of ecclesiastical courts, in the probate of wills and granting of administrations of personal estate; to the sentences of prize-courts in all matters of prize jurisdiction; and to the sentences of courts of admiralty, and other courts acting *in rem*, either to enforce forfeitures or to decide civil rights.

In the preceding discussion, we have been unavoidably led to consider and affirm the conclusiveness of the sentence of a court of competent jurisdiction proceeding *in rem*, as to the question of forfeiture; and *à fortiori*, to affirm it, in a case where there is an exclusive jurisdiction. In cases of condemnation, the authorities are so distinct and pointed, that it would, after the very learned discussions in the state court, be a waste of time to examine them at large. Nothing can be better settled, than that a sentence of condemnation *is, in an action of trespass for the property seized, conclusive evidence against the title of the plaintiff. (See [*316 Harg. Tracts 467, and cases there cited; *Thomas* v. *Withers*, cited by Mr. Justice BULLER, in *Wilkins* v. *Despard*, 5 T. R. 112, 117; *Scott* v. *Shearman*, 2 W. Bl. 977; *Henshaw* v. *Pleasance*, Ibid. 1174; *Geyer* v. *Aguilar*, 7 T. R. 681, and case cited by Lord KENYON, Ibid. 696; *Meadows* v. *Duchess of Kingston*, Ambler 756; 2 Evans' Pothier on Obligations, 346 to 367.)

A distinction, however, has been taken, and attempted to be sustained at the bar, between the effect of a sentence of condemnation, and of a sentence of acquittal. It is admitted, that the former is conclusive; but it is said, that it is otherwise as to the latter, for it ascertains no fact. It is certainly incumbent on the party who asserts such a distinction, to prove its existence by direct authorities, or inductions from known and admitted principles. In the *Duchess of Kingston's case* (11 State Trials 261; Runnington Eject. 364; Hale, Hist. Com. Law, by Runnington, note, p. 39, &c.), Lord Chief Justice DE GREY declares, that the rule of evidence must be, as it is often declared to be, reciprocal; and that in all cases in which the sentences favorable to the party are to be admitted as conclusive evidence for him, the sentences, if unfavorable, are, in like manner, conclusive evidence against him. This is the language of very high authority, since it is the united opinion of all the judges of England; and though delivered in terms applicable strictly to a criminal suit, must be *deemed equally to apply to civil suits and sentences. And upon principle, where is there to be found a sub- [*317 stantial difference between a sentence of condemnation and of acquittal *in rem?* If the former ascertains and fixes the forfeiture, and therefore, is

conclusive, the latter no less ascertains that there is no forfeiture, and therefore, restores the property to the claimant. It cannot be pretended, that a new seizure might, after an acquittal, be made for the same supposed offence; or if made, that the former sentence would not, as evidence, be conclusive, and, as a bar, be peremptory against the second suit *in rem*. And if conclusive either way, it must be, because the acquittal ascertains the fact, that there was no forfeiture. And if the fact be found, it is strange, that it cannot be evidence for the party, if found one way, and yet can be evidence against him, if found another way. If such were the rule, it would be a perfect anomaly in the law, and utterly subversive of the first principles of reciprocal justice. The only authority relied on for this purpose is a *dictum* in Buller's Nisi Prius 245, where it is said, that though a conviction in a court of criminal jurisdiction be conclusive evidence of the fact, if it afterwards come collaterally in controversy in a court of civil jurisdiction; yet, an acquittal in such court, is no proof of the reverse, for an acquittal ascertains no fact, as a conviction does. The case relied on to support this *dictum* (3 Mod. 164) contains nothing which lends any countenance to it. (Peake's Evid. 3d ed., p. 47, 48.) But assuming it to be good law, in respect to criminal suits, it has *nothing to do with proceedings *in rem*. Where
[*318 property is seized and libelled, as forfeited to the government, the sole object of the suit is to ascertain whether the seizure be rightful, and the forfeiture incurred or not. The decree of the court, in such case, acts upon the thing itself, and binds the interests of all the world, whether any party actually appears or not. If it is condemned, the title of the property is completely changed, and the new title acquired by the forfeiture travels with the thing in all its future progress. If, on the other hand, it is acquitted, the taint of forfeiture is completely removed, and cannot be re-annexed to it. The original owner stands upon his title, discharged of any latent claims, with which the supposed forfeiture may have previously infected it. A sentence of acquittal *in rem* does, therefore, ascertain a fact, as much as a sentence of condemnation; it ascertains and fixes the fact that the property is not liable to the asserted claim of forfeiture. It should, therefore, be conclusive upon all the world, of the non-existence of the title of forfeiture, for the same reason that a sentence of condemnation is conclusive of the existence of the title of forfeiture. It would be strange indeed, if, when the forfeiture *ex directo* could not be enforced against the thing, but by an acquittal was completely purged away, that indirectly, the forfeiture might be enforced, through the seizing officer; and that he should be at liberty to assert a title for the government, which is judicially abandoned by, or conclusively established against, the government itself.

*319] *One argument further has been urged at the bar, on this point, which deserves notice. It is, that the sentence of acquittal ought not to be conclusive upon the original defendants, because they were not parties to that suit. This argument addresses itself equally to a sentence of condemnation; and yet, in such case, the sentence would have been conclusive evidence in favor of the defendants. The reason, however, of this rule is to be found in the nature of proceedings *in rem*. To such proceedings all persons having an interest or title in the subject-matter are, as we have already stated, in law, deemed parties; and the decree of the court is conclusive upon all interests and titles in controversy before it. The title of

forfeiture is necessarily in controversy, in a suit to establish that forfeiture; and therefore, all persons having a right or interest in establishing it (as the seizing officer has) are, in legal contemplation, parties to the suit. It is a great mistake, to consider the seizing officer as a mere stranger to the suit. He virtually identifies himself with the government itself, whose agent he is, from the moment of the seizure, up to the termination of the suit. His own will is bound up in the acts of the government in reference to the suit. For some purposes, as for instance, to procure a decree of distribution, after condemnation, where he is entitled to share in the forfeiture, or to obtain a certificate of reasonable cause of seizure, after an acquittal, he may make himself a direct party to the suit, and in all other cases, he is deemed to be present and represented by the government itself. By the very act of seizure, he agrees to become a party to *the suit, under the government; for in no other manner can he show an authority to make the seizure, or [*320 to enforce the forfeiture. If the government refuse to adopt his acts, or waive the forfeiture, there is an end to his claim; he cannot proceed to enforce that which the government repudiates. In legal propriety, therefore, he cannot be deemed a stranger to the decree *in rem;* he is, at all events, a privy, and as such must be bound by a sentence which ascertains the seizure to be tortious. But if he were a mere stranger, he would still be bound by such sentence, because the decree of a court of competent jurisdiction *in rem* is, as to the points directly in judgment, conclusive upon the whole world.

Upon principle, therefore, we are of opinion, that the sentence of acquittal in this case, with a denial of a certificate of reasonable cause of seizure, was conclusive evidence that no forfeiture was incurred, and that the seizure was tortious; and that these questions cannot again be litigated in any other *forum*. And if the point had never been decided, we should, from its reasonableness and known analogy to other proceedings, have had entire confidence in the correctness of the doctrine. But there are authorities directly in point, which have never been overruled, nor so far as we know, ever been brought judicially into doubt.

Above a century ago, it was decided by Mr. Baron PRICE (12 Vin. Abr. A, *b*, 22, p. 95), that an acquittal in the exchequer was conclusive evidence of the illegality of the seizure, and he refused, in that case (which was trover for the goods seized), to let the parties in *to contest the fact over again. This case was cited as undoubted law before Mr. Justice [321 BLACKSTONE, in his elaborate opinion in *Scott* v. *Shearman* (2 W. Bl. 977); and the doctrine was fully recognised by the court, and particularly by Lord KENYON, in *Cooke* v. *Sholl* (5 T. R. 225), although that cause finally went off upon another point. In all the cases which have been decided on this subject, no distinction has ever been taken between a condemnation and an acquittal *in rem*, and the manner in which these cases have been cited by the court, obviously shows that, no such distinction was ever in their contemplation. If to these decisions we add the pointed language of Lord Chief Justice DE GREY (in the *Duchess of Kingston's case*, 11 State Trials 218, &c.), "that the rule of evidence must be, as it is often declared to be, reciprocal;" the declaration of Lord KENYON (in *Geyer* v. *Aguilar*, 7 T. R. 681, 696), that "where there has been a proceeding in the exchequer, and a judgment *in rem*, as long as that judgment remains in force, it is obliga-

tory upon the parties who have civil rights depending on the same question;" and the general rule laid down by Lord APSLEY (*Meadows* v. *Duchess of Kingston*, Amb. 756), that where a matter comes to be tried in "a collateral way, the decree of a court having competent jurisdiction shall be received as conclusive evidence of the matter," *ex directo* determined; there seems a weight of authority in favor of the doctrine, which it is very difficult to resist. We may add, that in a recent case, which was not cited at the argument (*The Bennet*, 1 Dodson 175, 180), where a ship had been captured
*322] *as prize, as being engaged in an illegal voyage, and acquitted by the sentence of a vice-admiralty court, Sir W. SCOTT held, that by such sentence of a competent tribunal, the question had become *res adjudicata*, and might be opposed with success as a bar to any inquiry into the same facts, upon a second capture, during the same voyage. Yet, here, the parties, who were captors, were different; and the argument might have been urged, that the acquittal ascertained no fact. The learned judge, however, considered the acquittal conclusive proof against the illegality of the voyage, and that all the world were bound by the sentence of acquittal *in rem*. And the same doctrine was held by Mr. Justice BULLER, in his very learned opinion in *Le Caux* v. *Eden* (2 Doug. 594, 611, 612). (*a*)

*323] *This view of the case would be conclusive against the admission of the evidence offered by the original defendants, at the trial, as a justification of the asserted trespass. But the other point which has been stated, and which involves the construction of the act of 1794, ch. 50, § 3, is not less decisive against the defendants. That act inflicts a forfeiture of the ship, &c., in cases where she is fitted out and armed, or attempted or procured to be fitted out and armed, with the intent to be employed "in the service of any foreign prince or state, to cruise or commit hostilities upon the subjects, citizens or property of another foreign prince or state, with whom the United States are at peace." The evidence offered and rejected, was to prove that the ship was attempted to be fitted out and armed, and was fitted out and armed, with intent that she should be employed in the service of that part of the Island of St. Domingo which was then under the government of Petion, to cruise and commit hostilities upon the sub-

(*a*) In a recent case, in the court of exchequer, in England, it has been determined, that a judicial sale of a vessel, found at sea, and brought into port as derelict, under an order of the instance court of admiralty, on the part of the salvors and claimant (without fraud and collusion), is available against the crown's right of seizure for a previous forfeiture, incurred by the ship having been guilty of a forfeitable offence against the revenue laws: although the crown was not a party to the proceeding in the admiralty court, other than by the king's procurator-general claiming the vessel as a *droit* of admiralty; and although no decision of *droit* or no *droit* was pronounced, and the sale took place *pendente lite*, under an interlocutory order. It was held, that the crown should have claimed before the court, either as against the ship, in the first instance, or subsequently, against the proceeds of the sale, which were paid into the registry to answer claims under the order of sale, or have moved a prohibition. That the warrant for arresting the ship by the admiralty, and the process of citation, was notice to all the world of the subsequent proceedings: and that in pleading such sale, in defence to an information in the exchequer, the facts should be put specially on the record, so that the attorney-general might demur to or traverse them. The Attorney-General v. Norstedt (claiming the ship Triton), 3 Price 97. See Wynne's History of the Life of Sir Leoline Jenkins, vol. 2, p. 762.

jects, citizens and property of that part of the Island of St. Domingo which was then under the government of Christophe. *No evidence was offered, to prove that either of these governments was recognised by [*324 the government of the United States, or of France, "as a foreign prince or state;" and if the court was bound to admit the evidence, as it stood, without this additional proof, it must have been upon the ground, that it was bound to take judicial notice of the relations of the country with foreign states, and to decide affirmatively, that Petion and Christophe were foreign princes, within the purview of the statute. No doctrine is better established, than that it belongs exclusively to governments to recognise new states, in the revolutions which may occur in the world; and until such recognition, either by our own government, or the government to which the new state belonged, courts of justice are bound to consider the ancient state of things as remaining unaltered. This was expressly held by this court in the case of *Rose* v. *Himely* (4 Cranch 241), and to that decision on this point we adhere. And the same doctrine is clearly sustained by the judgment of foreign tribunals. (*The Manilla*, Edw. 1; *City of Berne* v. *Bank of England*, 9 Ves. 347; *Dolder* v. *Bank of England*, 10 Ibid. 353; 11 Ibid. 283.) If, therefore, this were a fact proper for the consideration of a jury, and to be proved *in pais*, the court below were not bound to admit the other evidence, unless this fact was proved, in aid of that evidence, for without it, no forfeiture could be incurred. If, on the other hand, this was matter of fact, of which the court were bound judicially to take cognisance, then the court were right in rejecting the evidence, for so *far as we have knowledge, neither the government of Petion nor Christophe [*325 have ever been recognised as a foreign state, by the government of the United States, or of France.

In every view, therefore, of this case, the state court were right in rejecting the evidence, so far as it was offered in justification. Was it then admissible in mitigation of damages? Upon this point, we really do not entertain the slightest doubt. The evidence had no legal tendency to show that any forfeiture had been incurred, and upon the proof already in the cause, the seizure was established to be tortious. The plaintiff admitted, that the defendants had acted without malice, or an intention of oppression. Under such circumstances, he waived any claim for vindictive damages, and the state court very properly directed the jury, that the plaintiff could only recover the actual damages sustained by him. And in no possible shape, consistently with the rules of law, could the evidence diminish the right of the plaintiff to recover his actual damages.

We have taken notice of this point, the more readily, because it was pressed at the bar, with considerable earnestness. But in strictness of law, the point is not subject to our revision. We have no right, on a writ of error from a state court, under the act of congress, to inquire into the legal correctness of the rule by which the damages were ascertained and assessed. There is no law of the United States, which interferes with, or touches, the question of damages. It is a question depending altogether upon the common law; *and the act of congress has expressly precluded us from a consideration of such a question. Whether such a restriction can be [*326 defended, upon public policy, or principle, may well admit of most serious doubts.

We may now pass to the consideration of the second plea, which asserts, as a defence, a seizure under the laws of the United States, by the express instruction of the president, for a supposed forfeiture *in rem*, and attempts to put in issue the question, whether such forfeiture was incurred or not. If this plea was well pleaded, then a question may properly be said to arise, within the meaning of the 25th section of the judiciary act, and as the state court decided against the right and authority set up thereon, the decision is re-examinable in this court. Several objections have been urged at the bar against the sufficiency of this plea, upon technical grounds; and if these objections are well founded, then it may be admitted, that the court below may have given judgment on these special grounds, and not have decided against the right and authority set up under the United States.

In the first place, it is argued, that this plea is bad, because it does not answer the whole charge in the declaration, the plea justifying only the taking and detention, and containing no answer to the damaging, spoiling and conversion of the property charged in the declaration. We are, however, of opinion, that the plaintiff can take nothing by this objection. The gist of the action in this case was the taking and detention, and the damag-
*327] ing, spoiling and conversion were matter of aggravation only; *and it is perfectly well settled, that a plea need answer only the gist of the action, and if the matter alleged in aggravation be relied on as a substantive trespass, it should be replied by way of new assignment. (*Taylor* v. *Cole*, 3 T. R. 292; s. c. 1 H. Bl. 555; *Dye* v. *Leatherdall*, 3 Wils. 20; *Fisherwood* v. *Cannon*, cited 3 T. R. 297; *Gates* v. *Bayley*, 2 Wils. 313; 1 Saund. 28, note 3; Com. Dig. Plead. E. 1; *Monprivatt* v. *Smith*, 2 Camp. 175). Independent, however, of this general ground, there is, in this particular case, a decisive answer to the objection; for if the matter of the plea were true and well pleaded, then, by the forfeiture, the property was completely divested out of the plaintiff; and, consequently, neither the conversion nor damage were any injury to him.

But there are other defects in this plea which, in our judgment, are fatal. In the first place, it is not alleged, that the ship and her equipments were forfeited for any offence under the laws of the United States. It is true, that it is stated, that the ship was attempted to be fitted out and armed, with intent that she should be employed in the service of a foreign state, &c., to commit hostilities upon the subjects of another foreign state, &c., contrary to the statute in such case made and provided. But it is not added, whereby and for the cause aforesaid, she became and was forfeited to the United States. Nor is this deficiency supplied by the subsequent averment, that the ship was, by the instructions of the president, seized "as forfeited to the use of the United States;" for the manner and cause of the forfeiture
*328] ought to *be directly stated. The plea is, therefore, not only argumentative, but it omits a substantive allegation, without which, it could not be sustained as a bar.

In the next place, the plea is bad, because it does not aver that the governments of Petion and Christophe are foreign states which have been duly recognised, as such, by the government of the United States, or of France, which, for reasons already stated, was necessary to complete the legal sufficiency of the plea.

And in our judgment, a still more decisive objection is, that the plea

attempts to draw to the cognisance of a state court, a question of forfeiture under the laws of the United States, of which the federal courts have, by the constitution and laws of the United States, an exclusive jurisdiction. For the reasons already mentioned, if the suit for the forfeiture was still pending, when the action was brought, that fact ought to have been pleaded in abatement, or as a temporary bar to such action: if the action was brought before proceedings *in rem* had been instituted, that fact ought to have been pleaded, with an allegation that the jurisdiction of the question of forfeiture exclusively belonged to the district court of the district where the seizure was made, which would have been a plea in the nature of a plea to the jurisdiction of the state court: if the suit were determined, then a condemnation, or an acquittal, with a certificate of reasonable cause of seizure, ought to have been pleaded, as a general bar to the action These are all the legal defences which the mere seizure could justify; and if these all failed, then the *seizing officer must have been deemed guilty of the trespass. The plea, then, stops short of the allegations [*329 which the seizing officer was bound to make, to sustain his defence, and it attempts to put in issue matter which, standing alone, no court of common law is competent to try. The demurrer, then, may well be sustained to this plea, since the party demurring admits nothing except what is well pleaded, and the plea being bad in substance, there is, in point of law, no confession of any forfeiture.

The third plea differs in several respects from the second, and is that on which the court have felt their principal difficulty. It asserts, that the ship was attempted to be fitted out and armed, with intent that she should be employed in the service of some foreign state, to commit hostilities upon the subjects of another foreign state, with which the United States were then at peace, contrary to the form of the statute in such case made and provided; and that the defendants, by virtue of the instructions of the president, "did take possession of, and detain," the said ship, &c., "in order to the execution of the prohibitions and penalties of the act in such case made and provided." It omits to allege any forfeiture of the ship, or that she was seized as forfeited. So far then as the plea may be supposed to rely on such forfeiture as a justification, it is open to the same objections which have been stated against the second plea. Another objection has been urged at the bar against this plea, which does not apply to the second. It is, that it does not specify the foreign state in *whose service, or against whom, the ship was intended to be employed. As the allegation follows the [*330 words of the statute, it has sufficient certainty for a libel or information *in rem*, for the asserted forfeiture under the statute; and consequently, it has sufficient certainty for a plea. Indeed, there is as much certainty as there would have been, if it had been averred that it was in the service of, or against, some foreign state, unknown to the libellant, which has been adjudged in this court, to be sufficient in an information of forfeiture. (*Locke* v. *United States*, 7 Cranch 339.)

But the main objection to this plea is, that it attempts to justify the taking possession and detaining of the ship, under the instructions of the president, when the facts stated in the plea do not bring the case within the purview of the statute of 1794, ch. 50, which is relied on for this purpose. This statute, in the seventh section, provides, that in every case in which a

vessel shall be fitted out and armed, or attempted to be fitted out and armed, or in which the force of any vessel of war, cruiser or other armed vessel, shall be increased or augmented, or in which any military expedition or enterprise shall be begun, or set on foot, contrary to the prohibitions and provisions of that act, and in every case of the capture of a ship or vessel, within the jurisdiction or protection of the United States, and in every case in which any process, issuing out of any court of the United States, shall be disobeyed or resisted by any person or persons, having the custody of any vessel of war, cruiser or other armed vessel of any foreign prince or state,
*331] *or of the subjects or citizens of any such prince or state; in every such case, it shall be lawful for the president of the United States, or such other person as he shall have empowered for that purpose, to employ such part of the land or naval forces of the United States, or of the militia thereof, as shall be judged necessary for the purpose of taking possession of and detaining any such ship or vessel, with her prize or prizes, if any, in order to the execution of the prohibitions and penalties of the act, &c.

It is to be reccollected, that this third plea does not allege any forfeiture, nor justify the taking and detaining of the ship, for any supposed forfeiture; and that it does not allege, that the president did employ any part of the land or naval forces, or militia of the United States for this purpose, or that the original defendants, or either of them, belonged to the naval or military forces of the United States, or were employed in any such capacity, to take and detain the ship, in order to the execution of the prohibitions and penalties of the act. But the argument is, that as the president had authority by the act, to employ the naval and military forces of the United States for this purpose, *à fortiori*, he might do it by the employment of civil force. But upon the most deliberate consideration, we are of a different opinion. The power thus intrusted to the president is of a very high and delicate nature, and manifestly intended to be exercised only when, by the ordinary process or exercise of civil authority, the purposes of the law cannot be effectuated. It is to be exerted on extraordinary occasions, and subject to
*332] that high responsibility *which all executive acts necessarily involve. Whenever it is exerted, all persons who act in obedience to the executive instructions, in cases within the act, are completely justified in taking possession of, and detaining, the offending vessel, and are not responsible in damages, for any injury which the party may suffer by reason of such proceeding. Surely, it never could have been the intention of congress, that such a power should be allowed as a shield to the seizing officer, in cases where that seizure might be made by the ordinary civil means? One of the cases put in the section is, where any process of the courts of the United States is disobeyed and resisted; and this case abundantly shows, that the authority of the president was not intended to be called into exercise, unless where military and naval force were necessary to insure the execution of the laws. In terms, the section is confined to the employment of military and naval forces; and there is neither public policy nor principle, to justify an extension of the prerogative, beyond the terms in which it is given. Congress might be perfectly willing to intrust the president with the power to take and detain, whenever, in his opinion, the case was so flagrant, that military or naval force were necessary to enforce the laws, and yet, with great propriety, deny it, where, from the circumstances

of the case, the civil officers of the government might, upon their private responsibility, without any danger to the public peace, completely execute them. It is certainly against the general theory of our institutions, to create great discretionary powers by implication; and in the present instance, *we see nothing to justify it. The third plea is, therefore, [*333 for this additional reason, bad, in its very substance, and the state court were right in giving judgment on the demurrer for the original plaintiff.

The judgment of the court for the correction of errors of the state of New York is affirmed, with damages at the rate of six per cent. upon the judgment, from the rendition thereof, and costs.

JOHNSON, Justice.—As the opinion delivered in this case goes into the consideration of a variety of topics which do not appear to me to be essential to the case, I will present a brief view of all that I consider as now decided.

Three pleas are filed to the action. The first is the general issue, under which, according to the practice of the state from which the case comes, notice was given that the forfeiture would be given in evidence. The second plea is a justification, on the ground of a seizure under the order of the president, for the forfeiture incurred under the third section of the act of 1794. The third is a justification under the order of the president, to detain for the purpose of enforcing the prohibitions and penalties incurred under the third section. And this order is supposed to have been issued under authority given in the seventh section.

On the first plea, issue was taken; and on the trial, the state court refused to admit evidence of the forfeiture, *on the ground that the [*334 acquittal in the district court was conclusive against the forfeiture. And on this point, this court is of opinion, that the state court decided correctly. This court is also of opinion, that the state court could not have tried the question of forfeiture arising under the laws of the United States. But this point would have been fatal to the suit, not to the defence, had it been properly pleaded. To the second and third pleas, the defendant demurred: but as the second plea contained only an argumentative, and, of course, defective averment of the forfeiture, viz., "seized as forfeited," that is "because forfeited," that plea did not bring up the question of forfeiture, or any question connected with it. Neither does the third plea bring up the question of forfeiture: for the justification therein relied on is wholly independent of the forfeiture, and rests upon the order of the president to detain for trial, in effect. And hence, the only other point in the case is, whether the seventh section of the act empowered the president to issue such an order. And on this point, we are of opinion, that there is no power given by that act, to authorize a seizure, but only to call out the military or naval forces to enforce a seizure, when necessary. The defence set up is not founded upon the exercise of such a power, but upon a supposed order to the defendants, in their private individual character, to take and detain. The act, therefore, does not sustain the defence.

Judgment affirmed.

*_D. B. Ogden_ inquired, to which of the state courts the mandate [*335 to enforce the judgment was to be transmitted.

MARSHALL, Ch. J.—We must consider the record as still remaining in the supreme court of New York, and consequently, the mandate must be directed to that court.

Mandate to the supreme court of New York.

JUDGMENT.—This cause came on to be heard, on the transcript of the record of the supreme court of judicature of the people of the state of New York, returned with the writ of error issued in this case, and was argued by counsel: On consideration whereof, it is adjudged and ordered, that this court having the power of revising, by writ of error, the judgment of the highest court of law in any state, in the cases specified in the act of congress, in such case provided, at any time within five years from the rendition of the judgment in the said courts, have the power to bring before them the record of any such judgment, as well from the highest court of law in any state, as from any court to which the record of the said judgment may have been remitted, and in which it may be found, when the writ of error from this court is issued. And the court, therefore, in virtue of the writ of error in this cause, do proceed and take cognisance of this cause upon the transcript of the record now remaining in the supreme court of judicature of the people of the state of New York; and they do hereby adjudge and order, that the judgment of the court for the trial of impeachments and *correction of errors in this case be, and the same is hereby affirmed, with costs and damages, at the rate of six per centum *per annum* on the amount of the judgment of the said court for the trial of impeachments and correction of errors of the state of New York, to be computed from the time of the rendition of the judgment of the said court for the trial of impeachments and correction of errors of the state of New York.

*336]

UNITED STATES *v.* BEVANS.

Jurisdiction.

Admitting, that the 3d article of the constitution of the United States, which declares, that "the judicial power shall extend to all cases of admiralty and maritime jurisdiction," vests in the United States exclusive jurisdiction of all such cases, and that a murder committed in the waters of a state, where the tide ebbs and flows, is a case of admiralty and maritime jurisdiction; congress have not, in the 8th section of the act of 1790, ch. 9, "for the punishment of certain offences against the United States," so exercised this power, as to confer on the courts of the United States jurisdiction over such murder.

Quære? Whether courts of common law have concurrent jurisdiction with the admiralty over murder committed in bays, &c., which are inclosed parts of the sea?

Congress having, in the 8th section of the act of 1790, ch. 9, provided for the punishment of murder, &c., committed, "upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular state," it is not the offence committed, but the bay, &c., in which it is committed, that must be out of the jurisdiction of the state.

*The grant to the United States, in the constitution, of all cases of admiralty and maritime jurisdiction, does not extend to a cession of the waters in which those cases may arise, or of general jurisdiction over the same: congress may pass all laws which are necessary for giving the most complete effect to the exercise of the admiralty and maritime jurisdiction granted to the government of the Union; but the general jurisdiction over the place, subject to this grant, adheres to the territory, as a portion of territory not yet given away; and the residuary powers of legislation still remain in this state.[1] [*337

Congress have power to provide for the punishment of offences committed by persons serving on board a ship of war of the United States, wherever that ship may lie: but congress have not exercised that power, in the case of a ship lying in the waters of the United States; the words "within any fort, arsenal, dock-yard, magazine, or in any other place or district of country under the sole and exclusive jurisdiction of the United States," in the 3d section of the act of 1790, ch. 9, not extending to a ship of war, but only to objects in their nature fixed and territorial.

THE defendant, William Bevans, was indicted for murder, in the Circuit Court for the district of Massachusetts. The indictment was founded on the 8th section of the act of congress of the 30th of April, 1790, ch. 9, and was tried upon the plea of "not guilty."

At the trial, it appeared in evidence, that the offence charged in the indictment, was committed by the prisoner, on the sixth day of November 1816, on board the United States ship of war Independence, rated a ship of the line of seventy-four guns, then in commission, and in the actual service of the United States, under the command of Commodore Bainbridge. At the same time, William Bevans was a marine, duly enlisted, and in the service of the United States, and was acting as sentry, regularly posted on board of said ship, and Peter Leinstrum (the deceased, named in the indictment) was, at the same time, *duly enlisted, and in the service of the United States as cook's mate on board of said ship. The said ship [*338 was, at the same time, lying at anchor, in the main channel of Boston harbor, in waters of a sufficient depth, at all times of tide, for ships of the largest class and burden, and to which there is at all times a free and unobstructed passage to the open sea or ocean. The nearest land, at low-water mark, to the position where the said ship then lay, on various sides, was as follows, viz: The end of the long-wharf, so called, in the town of Boston, bearing south-west by south half south, at the distance of half a mile; the western part of Williams's Island bearing north by west, at the distance

[1] Jones v. State of Maryland, 18 How. 71, 76.

between one-quarter and one-third of a mile; the navy-yard of the United States, at Charlestown, bearing north-west half west, at the distance of three-quarters of a mile, and Dorchester point, so called, bearing south south-east, at the distance of two miles and one-quarter, and the nearest point of Governor's Island, so called (ceded to the United States), bearing south-east half east, at the distance of one mile and three-quarters. To and beyond the position or place thus described, the civil and criminal processes of the courts of the state of Massachusetts, had hitherto constantly been served and obeyed. The prisoner was first apprehended for the offence, in the district of Massachusetts.

The jury found a verdict that the prisoner, William Bevans, was guilty of the offence, as charged in the indictment.

*339] Upon the foregoing statement of facts, which *was stated and made, under the direction of the court, the prisoner, by his counsel, after verdict, moved for a new trial, upon which motion two questions occurred, which also occurred at the trial of the prisoner:

1. Whether, upon the foregoing statement of facts, the offence charged in the indictment, and committed on board the said ship as aforesaid, was within the jurisdiction of the state of Massachusetts, or of any court thereof?

2. Whether the offence charged in the indictment, and committed on board the said ship as aforesaid, was within the jurisdiction or cognisance of the circuit court of the United States for the district of Massachusetts?

Upon which questions, the judges of the said circuit court were, at the trial, and upon the motion for a new trial, opposed in opinion; and thereupon, upon the request of the district-attorney of the United States, the same questions were ordered by the said court to be certified, under the seal of the court, to the supreme court, to be finally decided.

February 14th. *Webster*, for the defendant.—The ground of the motion for a new trial in this case is, that on the facts proved, the offence is not within the jurisdiction of the circuit court of the United States. The indictment is founded on the 8th section of the act of congress, for the punishment of certain crimes; by which act, murder is made cognisable in the courts of the United States, if committed "upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular state."

*340] To sustain the jurisdiction, *in this case, then, it must appear, either that the place where the murder was committed was the "high seas," or that it was a river, bay or basin, not within the jurisdiction of any state.

1. The murder was not committed on the high seas, because it was committed in a port or harbor; and ports and harbors are not parts of the high seas. To some purposes, they may be considered as parts of the sea, but not of the high sea. Lord HALE says, "the sea is either that which lies within the body of a county, or without. The part of the sea which lies not within the body of a county, is called the main sea or ocean." Hale, *de Jure Maris*, ch. 4. By the "main sea," Lord Hale undoubtedly means the same as is expressed by "high sea," "*mare altum*," or "*le haut meer*." There is a distinction between the meaning of these last terms, and the meaning of the sea. And this distinction does not consist merely in this, that it is "high sea" to low-water mark only, and sea to high-water mark, when the tide is full. A more obvious ground of distinction is, that the

high seas import the uninclosed and open ocean, without the *fauces terræ*. So Lord Hale must be understood, in the passage cited. Ports and harbors are, by the common law, within the bodies of counties; and that being the high sea which lies not within the body of any county, ports and harbors are, consequently, not part of the high seas. Exton, one of the distinguished advocates of the admiralty jurisdiction, sneers at the common *lawyers, for the alleged absurdity of supposing ships to ride at anchor, [*341 or to sail, within the body of the county. The common lawyers might retort, the greater incongruity of supposing ports and harbors to be found on the high seas. Exton 146. "Touching treason or felony," says Lord Hale, "committed on the high sea, as the law now stands, it is not determinable by the common-law courts. But if a felony be committed in a navigable arm of the sea, the common law hath a concurrent jurisdiction." 2 Hale H. P. C. ch. 3. A navigable arm of the sea, therefore, is not the high sea. The common and obvious meaning of the expression, "high seas," is also the true legal meaning. The expression describes the open ocean, where the dominion of the winds and waves prevails without check or control. Ports and harbors, on the contrary, are places of refuge, in which protection and shelter are sought from this turbulent dominion, within the inclosures and projections of the land. The high sea, and havens, instead of being of similar import, are always terms of opposition.

"Insula *portum*
Efficit objectu laterum: quibus omnis ab *alto*
Frangitur, inque sinus scindit sese unda reductos."

The distinction is not only asserted by the common lawyers, but recognised by the most distinguished civilians, notwithstanding what is said in the case in Owen, p. 123, and some other *dicta*. The statute 13 Richard II., ch. 5, *allows the admiral to entertain jurisdiction of things done on the [*342 sea—"*sur le meer*." The civilians contend, that by this expression, the admiralty has jurisdiction in ports and havens, because the admiral is limited to such things as are done on the sea, and not to such only as are done on the *high* sea. In remarking upon this, and other statutes relating to the admiralty, in his argument for the jurisdiction of that court, delivered in the House of Lords, Sir Leoline Jenkins says: "The admiral being a *judex ordinarius* (as Bracton calls such as have their jurisdiction fixed, perpetual and natural), for 100 years before this statute; it shall not be intended to restrain him any further than the words do necessarily and unavoidably import. For instance, the statutes say, that the admiral shall intermeddle only with things done upon the sea; it will be too hard a construction, to remove him further, and to keep him only *super altum mare:* if he had jurisdiction before, in havens, ports and creeks, he shall have it still; because all derogations to an antecedent right are odious, and ought to be strictly taken." Life of Sir L. Jenkins, vol. 1, p. 97. This argument evidently proceeds on the ground of an acknowledged distinction between the sea, and the *high* sea; the former including ports and harbors, the latter excluding them. Exton's comment on the same statute, 13 Ric. II., ch. 5, is to the same effect. "Here, *sur le meer*," says he, "I hope shall not be taken for *super altum mare;* when as the statute is absolutely free from distinguishing *any one part [*343 of the sea from the other, or limiting the admiral's jurisdiction unto one part thereof, more than to another; but leaveth all to his cognisance. But

this I am sure of, that by the records throughout the reign (of Edward III.) the admirals were *capitœnai et admiralli omnium portuum et locorum per costeram naris* (as hath been already showed), as well as of the main sea." Exton 100. This writer is here endeavoring to establish the jurisdiction of the admiralty over ports and harbors, not as they are parts of the high sea, but as they are parts of the sea. He contends, therefore, against that construction of the statute by which jurisdiction on the sea would be confined to jurisdiction on the *high* sea. Upon the authority, therefore, of the civilians themselves, as well as on that of the common-law courts, ports and harbors must be considered as not included in the expression of the high seas. Indeed, the act of congress itself goes clearly upon the ground of this distinction. It provides for the punishment of murder and robbery committed on the high seas. It also provides for the punishment of the same offences, when committed in ports and harbors of a particular description. This additional provision would be absurd, but upon the supposition that ports and harbors were not part of the high sea.

2. If this murder was not committed on the high seas, was it committed in such haven or harbor as is not within the jurisdiction of any state? The case states, that in point of fact, the jurisdiction of Massachussetts has been *344] constantly exercised over *the place. *Primâ facie*, this is enough; it satisfies the intent of the act of congress. It shows, that the crime would not go unpunished, even if the authority of the United States court should not interfere. An actual jurisdiction in such cases will be presumed to be rightful. Thus, in the case of *Captain Goodere*, indicted for the murder of his brother, Sir John Dinley Goodere, in a ship, in Kingroad, below Bristol, the indictment being tried before the recorder of Bristol, and the murder being alleged to have been committed within the body of the county of that city, witnesses were called to prove that the process of the city government had frequently been served and obeyed, where the ship was lying, when the murder was committed on board; and this was holden to be sufficient to show that the offence was committed within the jurisdiction of the city. 6 State Trials 795. But the jurisdiction of Massachusetts over the place where this murder was committed, can be shown to be rightful. It is true, that the judicial power of the United States extends to all cases of admiralty and maritime jurisdiction; and it may be admitted, that this power is exclusive, and that no state can exercise any jurisdiction of that sort. Still, it will remain to be shown, not only that this offence is one of which the admiralty has jurisdiction, but also, that it is one of which the admiralty has exclusive jurisdiction. For although the state courts, and the courts of the United States, cannot have concurrent admiralty jurisdiction, yet the common law *345] and the admiralty may have concurrent jurisdiction; *and the state courts, in the exercise of their common-law jurisdiction, may have authority to try this offence, although it might also be subject to the concurrent jurisdiction of a court of admiralty, and might have been tried in the courts of the United States, if congress had seen fit to give the courts jurisdiction in such cases. But the act only gives jurisdiction to the circuit court in cases where there is no jurisdiction in the state courts. The state courts exercise, in this respect, the entire common-law jurisdiction. If, therefore, the common law has a jurisdiction in this case, either exclusive or concurrent, the authority of the circuit court under the act does not extend to

it. In order to sustain this conviction, it must be shown, not only that it is a case of exclusive admiralty jurisdiction, but also that congress has conferred on the circuit court all the admiralty jurisdiction that it could confer. But congress has not provided, that the admiralty jurisdiction of the circuit court over offences of this nature shall be exercised, in any case in which there is a concurrent common-law jurisdiction in the state courts. There is a jurisdiction, in this case, either exclusive or concurrent, in the common law; because the place where the murder was committed was a port or harbor, and all ports and harbors are taken, by the common law, to be within the bodies of counties. Com. Dig. Admiralty, E, 14; Bac. Abr. Court of Admiralty, A; 2 East P. C. 803. It is true, that by the statute 15 Ric. II., ch. 3, jurisdiction is given to the admiral over murder and mayhem, committed in *great ships, lying in the streams of great rivers, [*346
below the bridges, near the sea. Lord COKE's reading of this statute would altogether exclude the admiral's jurisdiction from ports and harbors; but Lord HALE holds the jurisdiction to be concurrent. "This statute first gave the admiral jurisdiction in any river or creek within the body of a county. But yet, observe, this is not exclusive of the courts of common law; and therefore, the king's bench, &c., have herein a concurrent jurisdiction with the court of admiralty." Hale H. P. C. ch. 3. And this doctrine of Lord Hale, is now supposed to be the settled law in England; viz., that the common law and the admiralty have concurrent jurisdiction over murder and mayhem, committed in great rivers, &c., beneath the bridges, next the sea. It is not doubted, certainly, that the common law has jurisdiction in such cases.

In *Goodere's Case*, before mentioned, some question arose, about the court in which the offender should be tried. The opinion of the attorney and solicitor-general, Sir Dudley Rider and Sir John Strange, was, that the trial must be in the county of the city of Bristol. He was, accordingly, tried before Sir Michal Foster, recorder of the city, and convicted. From the terms in which the opinion of the attorney and solicitor-general was expressed, it might be inferred, that the common law was thought to have exclusive jurisdiction of the case, agreeable to the well-known opinion of Lord Coke. At any rate, it was admitted to have jurisdiction, either exclusive or concurrent, and it *does not appear, that the civilians who were consulted [*347
on the occasion, Dr. Paul and Sir Edmund Isham, doubted of this. Dodson's Life of Sir Michael Foster, p. 4. If, then, the common law would have jurisdiction of this offence, in England, it has jurisdiction of it here. The admiralty will not exclude the common law, in this case, unless it would exclude it, in England. The extent of admiralty and maritime jurisdiction to be exercised under the constitution of the United States, must be judged of by the common law. The constitution must be construed, in this particular, by the same rule of interpretation which is applied to it in other particulars. It is impossible to understand or explain the constitution, without applying to it a common-law construction. It uses terms drawn from that science, and in many cases would be unintelligible or insensible, but for the aid of its interpretation. *United States* v. *Coolidge*, 1 Gallis. 488. The case cited shows, that the extent of the equity powers of the United States courts ought to be measured by the extent of these powers, in the general system of the common law; the same reason applies to the admiralty juris-

diction. There may be exceptions, founded on particular reasons, and extending as far as the reasons extend on which they are founded. But as a general rule, the admiralty jurisdiction must be limited as the common law limits it; and there is no reason for an exception in this case. There is no ground to believe, that the framers of the constitution intended to revive
*348] the old contention between the *common law and the admiralty. Whatever might have been the original merits of that question, it had become settled, and an actual practical limit had been fixed, for a long course of years. They cannot be supposed to have intended to disturb this, from a general impression that it might have been otherwise established at first. This, then, being a case, in which the common law has jurisdiction, according to established rules and usage, the act of congress has conferred no power to try the offence on the courts of the United States.

Wheaton, for the United States.—1. The state court had not jurisdiction of this case, because the offence was committed on board a national ship of war, which, together with the space of water she occupies, is extra-territorial, even when in the port of a foreign country: *à fortiori*, when in a port of the United States. A national ship is a part of the territory of the sovereign or state to which she belongs. A state has no jurisdiction in the territory of the United States; therefore, it has none in a ship of war belonging to the United States. The exemption of the territory of every sovereign from any foreign jurisdiction, is a fundamental principle of public law. This exemption is extended by comity, by reason, and by justice, to the cases, 1st. Of a foreign sovereign himself, going into the territory of another nation. Representing the power, dignity and all the sovereign attributes of his nation, and going into the territory of another state, under the permission, which, in time of peace, is implied from the absence of any
*349] *prohibition, he is not amenable to the civil or criminal jurisdiction of the country. 2d. Of an ambassador stationed in a foreign country, as the delegate of his sovereign, and to maintain the relations of peace and amity between his sovereign and the state where he resides. He is, by the constant usage of civilized nations, exempt from the local jurisdiction of the country where he resides. By a fiction of law, founded on this principle, he retains his national character unmixed, and his residence is considered as a continued residence in his own country. *The Caroline*, 6 Rob. 460. 3d. Of an army or fleet, or ship of war, marching through, sailing over, or stationed in the territory of another sovereign. If a foreign sovereign, or his minister, or a foreign ship of war, stationed within the territorial limits of a particular state of the union, is, in contemplation of law, extra-territorial, and independent of the jurisdiction of that state, *à fortiori*, must the army and navy of the United States be exempted from the same jurisdiction. If they were not, they would be in a worse situation than those of a foreign power, who are exempt both from the state and the national jurisdiction. Vattel says, that the territory of a nation comprehends every part of its just and lawful possessions. Droit des Gens, lib. 2, ch. 7, § 80. He also considers the ships of a nation, generally, as portions of its territory, though he admits the right of search for goods in merchant
*350] vessels. Ibid. lib. 1, ch. 19, § 216, 217. Grotius comes more directly to *the point we have in view. He holds, that sovereignty may be

acquired over a portion of the sea, "*ratione personarum, ut si classis, qui maritimis est exercitus, aliquo in loco, maris se habeat.*" De Jure Belli ac Pacis, lib. 2, ch. 3, § 13. So also, Casaregis maintains the same doctrine, and fortifies his position by multiplied citations from ancient writers of authority. He holds it as an undeniable and universally received principle of public law, that a sovereign cannot claim the exercise of jurisdiction in the seas adjacent to his territories, "*exceptis tamen ducibus generalibus vel generalissimis, alicujus exercitus vel classis maritimæ vel ductoribus, etiam alicujus navis militaris, nam isti in suos milites gentem et naves liberej urisdictionem, sive voluntariam, sive contensiosam, sive civilem, sive criminalem, in alieno territorio quod ocupant tamquam in suo proprio exercere possunt,*" &c. Disc. 174, 136. The case of *The Exchange*, determined in this court, after a most learned, able and eloquent investigation, puts the seal to the doctrine. 7 Cranch 116. If, as in that case, the exemption of foreign ships of war from the local jurisdiction, be placed on the footing of implied or express assent; that may more naturally and directly be inferred, in the case of a state of this Union, a member of the confederacy, than of a foreign power, unconnected by other ties than those of peace and amity which prevail between distinct nations. The exclusive jurisdiction which the United States have in forts and dock-yards ceded to them, is derived from the express *assent of the states by whom the cessions are made. It could be derived in no other manner; because, without it, the authority of the [*351 state would be supreme and exclusive therein. But the exclusive jurisdiction of the United States on board their ships of war, is not derived from the express assent of the individual states; because the United States have it in common with all other independent powers; they have it by the public law of the world; a concession of it in the constitution would have been merely declaratory of that law. The power granted to congress by the constitution, "to make rules for the government of the land and naval forces," merely respects the military police of the army and navy, to be maintained by articles of war, which form the military code.

But this case is not within the grasp of that code, the offence being committed within the jurisdiction of the United States. The power of a court-martial to punish murder, is confined to cases "without" the United States, by the act of the 23d of April 1800, for the government of the navy, ch. 33. In England, murder committed in the army or navy, is triable, not by courts-martial, but in the ordinary criminal courts of the country. But in what courts? In the national courts. If committed on land, in the courts of common law: if committed within the limits of the admiralty jurisdiction, at the admiralty sessions. Tytler's Military Law 153. In the memorable case of the frigate Chesapeake, the pretension of searching public ships for deserters, was solemnly *disavowed by the British government, and their immunity from the exercise of any jurisdiction but that of the sovereign power to which [*352 they belong, was spontaneously recognised. Mr. Canning's Letter to Mr. Monroe, August 3d, 1807, 5 Waites' Documents 89. The principle that every power have exclusive jurisdiction over offences committed on board their own public ships, wherever they may be, is also demonstrated in a speech of the present chief justice of the United States, delivered in the house of representatives on the celebrated case of Nash *alias* Robins; which argument, though made in another *forum*, and for another object, applies with irresistible force

to every claim of jurisdiction over a public ship that may be set up by any sovereign power other than that to which such ship belongs. Bee 266 n. (*a*)

(*a*) The Edinburgh Review for October 1807, art. 1, contains an examination of this subject, in which the writer deduces the following propositions:

I. That the right to search for deserters on board of merchant ships, rests on the same basis as the right to search for contraband goods. The ground of this right being, in each case, the injury done to the belligerent—which can only be known by a search, and redressed by immediate impressment. (p. 9.)

II. That this right must be confined to merchant ships, and is wholly inapplicable to ships of war of any nation. That in case of the protecting of deserters by such ships, the only remedy lies in negotiation, and if that fails, in war. (p. 9, 10.) The non-existence of the right to search national ships, is inferred from the following arguments. 1. The great inconvenience of the exercise of the right—the tendency to create dissension. 2. The silence of all public jurists on the subject, though occasions have arisen, in which its existence would have settled the question in dispute at once. For example, the case of the Swedish convoy; the judgment of Sir W. Scott thereon; Dr. Croke's Remarks on Schlegel's Work; Letters of Sulpicius; Lord Grenville's speech on the Russian Treaty, November 1810. (p. 11.)

III. The language of all treaties, in which the subject of search is mentioned, where it is always confined to merchant ships. Consolato del Mare, ch. 273; Treaty of Whitehall, 1661, art. 12; Treaty of Copenhagen, 1670, art. 20; Treaty of Breda, 1667, art. 19; Treaty of Utrecht, 1713, art. 24; Treaty of Commerce with France, 1786, art. 26; Treaty with America, 1795, art. 17, 18, 19. So, in the language of jurists, the right is always confined to merchant ships. Vattel, lib. 3, ch. 7, § 113, 114; Martens on Privateers, ch. 2, § 20; Hubner, *de la Saisie des batimens neutres*, 1 vol. part 1, ch. 8; Whitlock's Mem. p. 654; Molloy *de Jur. Mar.* book 1, ch. 5.

IV. That the territory of an independent state is inviolable, and cannot be entered into to search for deserters. Vattel, lib. 2, ch. 7, § 93, § 64, and § 79. That the same principle of inviolability applies to the national ships, and that these floating citadels are as much a part of the territory as castles on dry land. They are public property, held by public men, in the public service, and governed by martial law. Moreover, the supreme power of the state resides in them, the sovereign is represented in them, and every act done by them is done in his name.

V. From the analogical case of the rights and privileges of ambassadors, every reason of which applies strongly to the present exemption. Vattel, lib. 4, ch. 7 and 8; Grotius, *de Jure Belli*, 17, 4, 4.

VI. From the absurdity of determining the claims of sovereign states in the tribunals of one of them: when these claims can only be decided by the parties themselves. Yet, if search in such case be resisted, the admiralty would, on capture, be the judge. All jurists agree, that there is no human court in which the disputes of nations can be tried. And no provisions are made in any treaty for a trial of this nature. (p. 15.)

VII. That the naval supremacy of Great Britain affords no argument for the right. That this naval supremacy was never admitted by other nations, generally, though it was by Holland. That it is confined to the British seas, and that even in them, it only respects the mere right of salute, and no more. See Grotius, lib 2, ch. 3, § 9, 13; Puffendorff, *de Jure Gent.* lib. 4, ch. 5, § 7; Seld. *Mar. Claus.* lib. 1, ch. 14; Ibid. lib. 2; Molloy, b. 1, ch. 5; Treaty of peace and alliance with Holland, 1654, art. 13; Treaty of Whitehall, 1662, art 10; Treaty of Breda, 1667, art. 19; Treaty of Westminster, 1674, art. 6; Treaty of Paris, 1784, with Holland, art. 2; Vattel, lib. 1, ch. 23, § 289. (p. 17, 18.)

VIII. Two instances only exist of an attempt to claim the right, and these were of Holland. In the negotiation of the peace of 1654, Cromwell endeavored to obtain from the Dutch the right to search for deserters in their vessels of war, within the British seas. But this was rejected, and the right of salute only acknowledged. Soon

*All jurisdiction is founded on consent; either the consent of all the citizens, implied in the social compact itself, or the express consent of the party or his sovereign. *But in this case, so far from there being any [*354 consent, implied or express, that the state courts should take cognisance of offences committed on board of ships of war belonging to the United States, *those ships enter the ports of the different states, under the [*355 permission of the state governments, which is as much a waiver of jurisdiction, as it would be in the case of a foreign ship, entering by the same permission. A foreign ship would be exempt from the local jurisdiction; and the sovereignty of the United States, on board their own ships of war, cannot be less perfect, while they remain in any of the ports of the confederacy, than if they were in a port wholly foreign. But we have seen, that when they are in a foreign port, they are exempt from the jurisdiction of the country. With still more reason, must they be exempt from the jurisdiction of the local tribunals, when they are in a port of the Union.

2. The state court had not jurisdiction, because the place in which the offence was committed (even if it had not been committed on board a public ship of war of the United States) is within the admiralty jurisdiction with which the federal courts are invested by the constitution and the laws. By the constitution, the judiciary power extends to "all cases of admiralty and martime jurisdiction." There can be no doubt, that the technical common-law terms used in the constitution are to be construed according to that law, such as "*habeas corpus*," "trial by jury," &c. But this is a term of universal law, "cases of admiralty and maritime jurisdiction:" not cases of admiralty jurisdiction only; but the amplest, broadest and most expansive terms that could be used to grasp the largest sense relative to the subject-matter. The framers of the constitution were not mere common lawyers only. Their minds were liberalized by a knowledge of universal *jurisprudence and general policy. They may as well, therefore, be supposed to have used [*356 the term admiralty and maritime jurisdiction, as denoting the jurisdiction of the admiralty in France, and in every country of the civilized world, as in England alone. But even supposing this not to have been the case, the statutes of Richard II., at their enactment, could not have been extended to this country, because the colonies did not then exist. They could not, afterwards, on the discovery and colonization of this country, become applicable here, because they are geographically local in their nature. British statutes were not in force in the colonies, unless the colonies were expressly, or by inevitable implication included therein. 1 Bl. Com. 107–8. We never admitted the right of the British parliament to bind us in any case, although they assumed the authority to bind us in all cases. It is, therefore, highly probable, that the framers of the constitution had in view the jurisdiction of those admiralty courts with which they were familiar. The jurisdiction of the colonial admiralty courts extended, 1st. To all maritime contracts, wherever made and wherever to be executed. 2d. To all revenue causes arising on navigable waters. 3d. To all offences committed "on the sea shores, public streams

after that peace (1654), the question was discussed, in consequence of a Dutch convoy being searched, as to the merchant ships, in the channel. The Dutch government, on this occasion, gave public instructions to their commanders to allow the merchant ships to be searched, but never to allow the ships of war. Thurloe, vol. 2, p. 503. (p. 19, 20.)

ports, fresh water rivers, and arms as well of the sea as of the rivers and coasts," &c. *De Lovio* v. *Boit*, 2 Gallis. 470 n. But if this construction should not be tenable, it may be shown, that an offence committed in *357] *the place where the record shows this case was committed, is within the rightful jurisdiction of the admiralty, according to English statutes and English authorities. Before the statutes of Richard II., the criminal jurisdiction of the admiralty extended to all offences committed on the high seas, and in the ports, havens and rivers of the kingdom.(*a*) Subsequently to the statutes of Richard, there has never been any question in England, that the admiralty had jurisdiction, on the sea-coast, within the ebb and flow of the tide. The doubt has been confined to ports and havens. But "the sea," technically so termed, includes ports and havens, rivers and creeks, as well as the sea-coasts; and therefore, the admiralty jurisdiction extends as well to these (within the ebb and flow) as to the sea-coasts. (*b*)

(*a*) Roughton's Articles, in Clerke's Praxis 99 *et infra;* Exton, book 12 and 13; Selden, *de Dominio Maris*, book 2, ch. 24; Zouch's Jurisdiction of the Admiralty asserted 96; Hall's Adm. Practice 19; Spelman's Works 226 (ed. 1727).

(*b*) *Nota.*—Que chescun ewe, que flow et reflow est appel bras de meer ci tant aunt come el flowe." 22 Assise 93. CHOKE, J.—"Si jeo ay terre adjoint al mere issint que le mere ebbe et flow sur ma terre, quant il flowe chescun poet pischer en le ewe que est flow sur ma terre, car donques il est parcel de le mere, et en le mere chescun homme poit pischer de common droit." Year Book, 8 Edw. IV. 19 *a;* s. c. cited 5 Co. 107.

"It was resolved, that where the sea flows and has *plenitudem maris*, the admiral shall have jurisdiction of everything done on the water, between the high-water mark by the natural course of the sea; yet, when the sea ebbs, the land may belong to a subject, and everything done on the land, when the sea is ebbed, shall be tried at the common law, for it is then parcel of the county and *infra corpus comitatus*, and therewith agrees 8 Edw. IV. 19 *a*. So note, that below the low-water mark, the admiral hath the sole and absolute jurisdiction; between the high-water mark and low-water mark, the common law and the admiral have *divisum imperium*, as is aforesaid, *scilicet* one *super aquam* and the other *super terram*." Sir Henry Constable's case, 5 Co. 106, 107.

"The place absolutely subject to the admiralty, is the sea, which seemeth to comprehend public rivers, fresh waters, creeks, and surrounded places whatsoever, within the ebbing and flowing of the sea, at the highest water, the shores or banks adjoining, from all the first bridges sea-ward, for in these the admiralty hath full jurisdiction in all causes, criminal and civil, except treasons and right of wreck." Spelman, of the Admiralty Jurisdiction, Works 226 (ed. 1726).

"The court was of opinion, that the contract being laid to be made *infra fluxum et refluxum maris*, it might be upon the high sea; and was so, if the water was at high-water mark, for in that case, there is *divisum imperium* between the common law and the admiralty jurisdiction, according as the water was high or low." Barber *v.* Wharton, 2 Ld. Raym. 1452.

The ancient commission, issued under the statute 28 Hen. VIII., ch. 15, concerning the trial of crimes committed within the admiralty jurisdiction, contains the following words, descriptive of the criminal jurisdiction of the court: "*Tam in aut super maris aut in aliquo porta, rivo, aqua dulci, creca, seu loco quocunque infra fluxum maris ad plenitudem, a quibuscunque primis ponnibus versus mare, quam super littus maris, et alibi ubicunque infra jurisdictionem nostram maritimam, aut limites admiralitatis regni nostri, et dominium nostrorum.*" Zouch 112, 2 Hale's P. C. ch. 3. Lord Hale, speaking of this statute (28 Hen. VIII., ch. 15), quoting the words which define the

On this branch of the case, it *would be useless to do more than refer to the opinion of one of the learned judges of this court, *De Lovio* v. *Boit*, 2 Gallis. 398, in which all the learning on the civil and criminal jurisdiction *of the admiralty is collected together, and concentrated in a blaze of luminous reasoning, to prove that this tribunal, [*359 before the statutes of Richard II., *had cognisance of all torts and [*360 offences, on the high seas, and in ports and havens, as far as the ebb and flow of the tide; that the usual common-law interpretation, abridging this jurisdiction to transactions wholly and exclusively on the high seas, is indefensible upon principle, and the decisions founded on it are irreconcilable with one another; whilst that of the civilians has all the consistency of truth itself; and that whether the English courts of common law be, or be not, bound by these decisions, so that they cannot retrace their steps, yet that the courts of this country are unshackled by any such bonds, and may and ought to construe liberally the grant of admiralty and maritime jurisdiction contained in the constitution. To the authorities there cited, add those in the margin, showing that the courts *of admiralty in Scotland, France [*361 and the other countries of Europe, possess the extent of jurisdiction we contend for.(*a*) The liberal construction of the constitution, for which

locality of the jurisdiction given to the high commission court, viz.: "in and upon the sea, or in any other haven, creek, river or place, where the admiral hath, or pretends to have power, authority or jurisdiction," this seems to me, to extend to great rivers, where the sea flows and re-flows, below the first bridges, and also in creeks of the sea at full water, where the sea flows and re-flows, and upon high water upon the shore, though these possibly be within the body of the county; for there, at least, by the statute of Rich. II., they have a jurisdiction; and thus, accordingly, it has been constantly used, in all times, even when judges of the common law have been named and sat in their commission; but we are not to extend the words "pretends to have" to such a pretence as is without any right at all, and therefore, although the admiral pretends to have jurisdiction upon the shore, when the water is re-flowed, yet he hath no cognisance of a felony committed there," &c. 2 Hale's P. C. ch. 3.

The navy mutiny act of 22 Geo. II., ch. 33, § 4, thus defines the jurisdiction of a navy court-martial, to wit: "Nothing contained in the articles of war shall extend or be construed to extend, to empower any court-martial, in virtue of this act, to proceed to the punishment or trial of any of the offences specified in the several articles (other than the offences specified in the 5th, 34th and 35th articles and orders), which shall not be committed upon the main sea, or in great rivers only, beneath the bridges of the said rivers, nigh to the sea, or in the haven, river or creek, within the jurisdiction of the admiralty," &c. In the 25th section of the act, is the following proviso: "Provided always, that nothing in this act shall extend, or be construed to extend, to take away from the Lord High Admiral of Great Britain, or the commissioners for executing the office of Lord High Admiral of Great Britain, or any vice-admiral, or any judge or judges of the admiralty, or his or their deputy or deputies, or any other officers or ministers of the admiralty, or any others having or claiming any admiralty power, jurisdiction or authority within the realm, or any other of the king's dominions, or from any person or court whatsoever, any power, right, jurisdiction, pre-eminence or authority, which he or they, or any of them, lawfully hath, have or had, or ought to have and enjoy, before the making of this act, so as the same person shall not be punished twice for the same offence." 1 McArthur on Courts Martial 174, 348 (4th ed.).

(*a*) In Scotland, the delegate of the high admiral, who holds the court of admiralty, "is declared to be the king's justice-general upon the seas, or fresh water, within flood and mark, and in all harbors and creeks," &c. 2 Bro. Civ. and Adm. Law 30,

we contend, is strongly fortified by the interpretation given to it by the congress in an analogous case, which interpretation has been confirmed by this court. The judiciary act declares that revenue suits, arising out of seizures
*362] on waters *navigable from the sea, &c., shall be causes of admiralty and maritime jurisdiction. And in the case of *The Vengeance*, 3 Dall. 297, and other successive cases, the court has confirmed the constitutionality of this legislative provision. But neither the congress nor the court could make those suits cases of admiralty and maritime jurisdiction, which were not so by the constitution itself. The constitution is the supreme law, both for the legislature and for the court. The high court of admiralty, in England, has no original jurisdiction of revenue causes whatever. But the colonial courts of admiralty have always had, and that, inherent, independent of, and pre-existent to, the statutes on this subject. *The Fabius*, 2 Rob. 245. The inevitable conclusion, therefore, is, that both the legislature and the court understood the term, cases of admiralty and maritime jurisdiction, to refer, not to the jurisdiction of the high court of admiralty, in England, as frittered down by the illiberal jealousy and unjust usurpations of the common-law courts; but to the admiralty jurisdiction, as it had been exercised in this country from its first colonization. But it has been already shown, that this jurisdiction extended to all crimes and offences committed in ports and havens. It, therefore, follows, that such was the extent of the admiralty jurisdiction meant to be conferred upon the federal courts by the framers of the constitution.

3. By the judiciary act of 1789, ch. 25, the circuit court has jurisdiction of all crimes cognisable under the authority of the United States. By the
*363] act of *1790, ch. 9, it is provided, that "if any person or persons shall commit, upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular state, murder," &c., "he shall suffer death." It appears by the face of the record itself, that this murder was committed, in fact, "in a river, haven or bay," and it has already been shown, that in law, it was committed out of the jurisdiction of any particular state.

The *Attorney-General*, on the same side.—If the offence in question be

490; Erskine's Institutes, 34 (10th ed.). "In Scotland (as Wellwood, a Scottish man, writes), the admiral and judge of the admiralty hath power within the sea-flood, over all sea-faring men, and in all-sea-faring causes and debates, civil and criminal: so that no other judge of any degree may meddle therewith, but only by way of assistance, as it was found in the action brought by Anthony de la Tour against Christian Martens, November 6th, 1542." Zouch 91.

"Connoîtront (les juges de l'amirauté) pareillement des pirateriés, pillages et desertions des equipages, et généralement de tous crimes et delits commis sur mer, ses ports, havres, et rivages." Ordonnance de la Marine, lib. 1, tit. 2, art. 10, *de la Compétence*. "L'amirauté étoit une veritable jurisdiction ayant le droit de glaive et conséquemment de juger les personnes tant au criminel qu'au civil, et certaines choses qui par leur nature étoient purement maritimes, ce qui résulte du titre de la compétence. Art. 2 et 10. Le tribunal des juges consols jugoient les choses commerciales; d'où sur il résultoit que les amirautés connoissent de tous les procès, actions et contrats venus pour vente le navires naufrages, assurances, etc., et les tribunaux consulaires de tous les actes de commerce purement mercantile." Rouchar, *Droit Maritime*, 727.

not cognisable by the circuit court, it is entirely dispunishable. The harbor of Boston is bounded by three distinct counties, but not included in either; consequently, the *locus in quo* is not within the body of any county. These three counties are Suffolk, Middlesex and Norfolk; and are referred to as early as the year 1637, in the public acts of the colony of Massachusetts, as then established. Colony Laws (ed. 1672), tit. Courts, 36, 37. It is not pretended, that the place where the ship of war lay, at the time this offence was committed, is within the limits of the county of Middlesex. By the act of the legislature of Massachusetts of the 26th of March 1793, all the territory of the county of Suffolk, not comprehended within the towns of Boston and Chelsea, was formed into a new county, by the name of Norfolk. And by this act, and the subsequent acts of the 20th of June 1793, and 18th of June 1803, the county of Suffolk now comprehends only the towns of Boston and Chelsea. The **locus in quo* cannot be within the body of either of these counties, or of the old county of Suffolk; for there [*364 is no positive law fixing the local limits of the counties themselves, or of the towns included therein: and according to the facts stated on the record, it is, at least, doubtful, whether a person on the land, on one side of the waters of the harbor, could discern what was done on the other side. 2 Hawk. P. C. ch. 9, § 14; 2 East P. C. 84. If the *locus in quo* be not within the body of any county, it is confessedly within the admiralty jurisdiction. That jurisdiction is exclusively vested in the United States courts (*Martin* v. *Hunter*, 1 Wheat. 333, 337), and therefore, the state court could not take cognisance of this offence. To whichever *forum*, however, the cause be assigned, the accused is equally safe. In either court, the trial is by a jury, and there is the same privilege of process to compel the attendance of witnesses, &c. The objection commonly urged to the admiralty jurisdiction, that it proceeds according to the course of the civil law, and without the intervention of a jury, would not apply. Besides, that objection is wholly unfounded, even as applied to the court, when proceeding in criminal cases, according to the ancient law of the admiralty, independent of statutes; when thus proceeding, it never acted without the aid of a grand and petit jury.

There is no doubt, the courts of the United States are courts of limited jurisdiction, but not limited as to each general class of cases of which they take cognisance. The terms of the constitution *embrace "*all* cases of admiralty and maritime jurisdiction," civil and criminal, and whether [*365 the same arise from the locality or from the nature of the controversy. The meaning and extent of these terms is to be sought for, not in the common law, but in the civil law. Suppose, the terms had been *jus postliminii*, or jactitation of marriage; where else, but to the civil law, could resort be had in order to ascertain their extent and import? It may be, that the jurisdiction of the civil-law courts is a subdivision of the great map of the common law; but in order to ascertain its limits, extent and boundaries, the map of this particular province must be minutely inspected. The common law had no imperial prerogative over the civil-law courts, by which they could be controlled, or have been in fact controlled. The terrors of prohibition were disregarded, and the contest between these rival jurisdictions was continued with unabated hostility, until the agreement signed by all the

judges in 1632, and ratified by the king in council.(*a*) The war between them would never have *been terminated, but by the overruling authority of the king in council. A temporary suspension of hostilities had been effected, by a previous agreement of *the judges of the king's bench and the admiralty, made in 1575; but that agreement was soon violated by the common-law courts.(*b*) So that the limits of

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(*a*) "Resolution upon the cases of Admiral Jurisdiction. Whitehall, 18th February. Present, the king's most excellent majesty.

Lord Keeper,	Lord V. Wimbleton,
Lord Ab. of York,	Lord V. Wentworth,
Lord Treasurer,	Lord V. Falkland,
Lord Privy Seal,	Lord Bishop of London,
Earl Marshall,	Lord Cottington,
Lord Chamberlain,	Lord Newburg,
Earl of Dorset,	Mr. Treasurer,
Earl of Carlisle,	Mr. Comptroller,
Earl of Holland,	Mr. Vice-Chamberlain,
Earl of Denbigh,	Mr. Secretary Coke,
Lord Chancellor of Scotland,	Mr. Secretary Windebank.
Earl of Morton,	

"This day, the king being present in council, the articles and propositions following, for the accommodating and settling the difference concerning prohibitions, arising between his majesty's courts at Westminster, and his court of admiralty, were fully debated and resolved by the board: and were then, likewise, upon reading the same, as well before the judges of his majesty's said courts at Westminster, as before the judge of his said court of admiralty, and his attorney-general, agreed unto, and subscribed by them all in his majesty's presence, viz: 1. If suit should be commenced in the court of admiralty, upon contracts made, or other things personal, done beyond the sea, or upon the sea, no prohibition is to be awarded. 2. If suit be before the admiral, for freight or mariner wages, or for breach of charter-parties, for wages to be made beyond the seas; though the charter-party happen to be made within the realm; so as the penalty be not demanded, a prohibition is not to be granted. But if the suit be for the penalty, or if the question be made, whether the charter-party be made or not; or whether the plaintiff did release, or otherwise discharge the same, within the realm; this is to be tried in the king's courts, and not in the admiralty. 3. If suit be in the court of admiralty, for building, amending, saving or necessary victualling of a ship, against the ship itself, and not against any party by name, but such as for his interest makes himself a party; no prohibition is to be granted, though this be done within the realm. 4. Although of some causes arising upon the Thames, beneath the bridge, and divers other rivers, beneath the first bridge, the king's courts have cognisance; yet the admiralty hath also jurisdiction there, in the point specially mentioned in the statute of *Decimo quinto Richardi Secundi*, and also by exposition and equity thereof, he may inquire of and redress all annoyances and obstructions in those rivers, that are any impediment to navigation or passage to or from the seas; and no prohibition is to be granted in such cases. 5. If any be imprisoned, and upon *habeas corpus* brought, it be certified, that any of these be the cause of his imprisonment, the party shall be remanded. Subscribed 4th February, 1632, by all the judges of both benches." Cro. Car. 296. (Lond. Ed. of 1657, by Sir Harbottle Grimstone.) These resolutions are inserted in the early editions of Croke's reports, but left out in the later, seemingly *ex industria*. 2 Bro. Civ. & Adm. Law 79.

(*b*) "12th of May 1575. The request of the judge of the admiralty to the lord chief justice of her majesty's bench, and his colleagues, with their answers to the same.

"1st Request.—That after judgment or sentence given in the court of admiralty, in any cause or appeal made from the same to the high court of chancery, it may

the *admiralty jurisdiction in England, as fixed at the time the United States constitution was established, could not be ascertained by the common law alone. Resort *must have been had for this purpose to [*369 the resolutions of the king in council, in 1575 and 1632, and to the

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please them to forbear the granting of any writ of prohibition, either to the judge of said court or to her majestie's delegates, at the sute of him by whom such appeal shall be made, seeing, by choice of remedy in that way, in reason, he ought to be contented therewith, and not to be relieved any other way.

"Answer.—It is agreed by the lord chief justice and his colleagues, that after sentence given in the delegates, no prohibition shall be granted. And if there be no sentence, if a prohibition be not sued for, within the next term following sentence in the admiralty-court, or within two terms after, at the furthest, no prohibition shall pass to the delegates.

"2d Request.—That prohibitions hereafter be not granted upon bare suggestions or surmises, without summary examination and proof thereof, wherein it may be lawful to the judge of the admiralty, and the party defendant to have counsel, and to plead for the stay thereof, if there shall appear cause.

"Answer.—They have agreed, that the judge of the admiralty and the party defendant shall have counsel in court, and to plead to stay, if there may appear evident cause.

"3d Request.—That the judge of the admiralty, according to such an ancient order as hath been taken by king Edward the first, and his council, and according to the letters-patent of the lord admiral for the time being, and allowed by other kings of the land ever since, and by custom, time out of the memory of man, may have and enjoy cognition of all contracts, and other things, rising as well beyond, as upon the sea, without let or prohibition.

"Answer.—This is agreed upon by the said lord chief justice, and his colleagues.

"4th Request.—That the said judges may have and enjoy the knowledge of the breach of charter-parties, made betwixt masters of ships and merchants, for voyages to be made to the parts beyond the sea, and to be performed upon and beyond the sea, according as it hath been accustomed, time out of mind, and according to the good meaning of the 32d of Henry VIII., c. 14, though the same charter-parties be made within the realm.

"Answer.—This is likewise agreed upon, for things to be performed, either upon or beyond the seas, though the charter-party be made upon the land, by the statute of the 32d of Henry VIII., chap. 14.

"5th Request.—That writs of *corpus cum causa* be not directed to the said judge, in causes of the nature aforesaid, and if any happen to be directed, that it may please them to accept of the return thereof, with the cause, and not the body, as it hath always been accustomed.

"Answer.—If any writ of this nature be directed in the causes before specified, they are content to return the bodies again to the Lord Admiral's jail, upon certificate of the cause to be such, or if it be for contempt or disobedience to the court in any such cause." Zouch's Jurisdiction of the Admiralty of England asserted, 121.

Extract from "The complaint of the Lord Admiral of England, to the king's most excellent majesty, against the judges of the realm, concerning prohibitions granted to the court of admiralty, 11 February, penultimo die Termini Hillarii, Anno 8 Jac. Regis: &c."

"5. To the end that the admiral jurisdiction may receive all manner of impeachment and interruption, the rivers beneath the first bridge where it ebbeth and floweth, and the ports and creeks, are, by the judges of the common law, affirmed to be no part of the seas, nor within the admiral jurisdiction: And whereupon, prohibitions are usually awarded upon actions depending in that court, for contracts and other things done in those places; notwithstanding that, by use and practice, time out of mind, the admiral court have had jurisdiction within such ports, creeks and rivers.

statutes of Richard II. and Henry VIII. *The framers of the constitution took a large and liberal view of this subject. They were not ignorant of the usurpations of the common-law courts upon the admiralty jurisdiction, and therefore, used *ex industriâ*, the broad terms "all cases of admiralty and maritime jurisdiction;" leaving the judiciary to determine the limit of these terms, not merely by the inconsistent decisions of the English common-law courts (which are irreconcilable with each other, and with the remains of jurisdiction that are by them acknowledged still to belong to the admiralty), but by an impartial view of the whole matter, going back to its original foundations. What cases are "of admiralty and maritime jurisdiction," must be determined, either by their nature, or by the place where they arise. The first class includes all questions of prize, and all maritime contracts wherever made, and wherever to be executed. The second includes all torts and offences committed on the high seas, and in ports and rivers within the ebb and flow of the tide.

It is within the latter branch of the admiralty jurisdiction that the present case falls. The jurisdiction of the admiralty, all over Europe, and the countries conquered and colonized by Europe, extends to the sea, and its inlets, arms and ports; wherever the tide ebbs and flows. Even in England, this particular offence, when "committed in great ships, being hovering in the main stream of great rivers, beneath the bridges of the same, nigh to the sea," is within the admiralty jurisdiction. The place where this murder was committed is precisely within the jurisdiction of the admiralty, as
*371] expounded *by Lord Hale, in his commentary on the statute 28 Hen. VIII., ch. 15, which has been preferred to Lord Coke's construction, by all the judges of England, in the very recent case of the *King*
*372] v. *Bruce.*(a) *The observation of Mr. Justice BULLER, in *Smart* v. *Wolff*, 3 T. R. 348, that "with respect to what is said relative to the

"7. That the agreement made Anno Domini 1575, between the judges of the king's bench and the court of admiralty for the more certain and quiet execution of admiral jurisdiction, is not observed as it ought to be." Zouch, Preface. The last of the above articles of complaint was answered by Sir Edward Coke in the name of the common-law judges as follows:

"Answer.—The supposed agreement mentioned in this article hath not as yet been delivered unto us, but having heard the same read over before his majesty (out of a paper not subscribed with the hand of any judge), we answer, that for so much thereof as differeth from these answers, it is against the laws and statutes of the realm: and therefore, the judges of the king's bench never assented thereunto, neither doth the phrase thereof agree with the terms of the law of the realm."

(a) "At the admiralty sessions, holden at the Old Bailey, in the year 1812, John Bruce was tried before Lord Ellenborough, Ch. J., for the wilful murder of a ferry-boy of the name of James Dean. The evidence of the fact was extremely clear, and was fully confessed by the prisoner himself at the trial, and the jury found him guilty. But it appeared also, that the place in which this murder was committed is a part of Milford Haven, in the passage over the same, between Bulwell and the opposite shore, near the town of Milford, the passage there being about three miles over. It was about seven or eight miles from the mouth of the river or open sea, and about sixteen miles below any bridges over the river: the water there, which was always perfectly salt, was generally above twenty-three feet deep, and the place was, excepting at very low tides indeed, never known to be dry. Men of war of seventy-four guns were then building near an inlet close by the place. In spring tides, sloops and cutters of one hundred tons burden, are navigable, where the body was found, which is also nearly

admiralty jurisdiction in 4 Inst. 135, I think that part of Lord Coke's work has been always received with great caution, and frequently contradicted. He seems to have entertained, not only a jealousy of, but an enmity against, that jurisdiction," is a sufficient answer to anything that depends on the authority of Lord Coke as to this controversy. If then the *locus in quo* be within the admiralty jurisdiction, it is "out of the jurisdiction of any particular state;" because all the states have surrendered, by the constitution, all the admiralty jurisdiction they formerly possessed to the United States. The criminal *branch of that jurisdiction has been given by the United States to the circuit court in the act of 1790, ch. 9. The *locus in* [*373
quo has not been shown to be within the state jurisdiction. Because the state process has been served therein, is no proof of the legality of such service; and the case does not state that such process had been, in any instance, served on board the public ships of war of the United States. Those ships are exempt even from a foreign jurisdiction; and when lying in the dominions of another nation, are not subject to its courts, but all civil and criminal causes arising on board of them are exclusively cognisable in the courts of the United States. This is a principle of public law which has its foundation in the equality and independence of sovereign states, and in the fatal inconveniences and confusion which any other rule would introduce. The merchant vessels of a nation may be searched for contraband, for enemy's property, or for smuggled goods, and, as some have contended, for deserters, whether they are on the high seas or in the ports of the searching power; but public ships of war may not be searched, whether on the high seas, or in the ports of the power making the search. The first may be searched anywhere, except within the jurisdiction of a neutral state. They may be searched on the ocean; because there all nations have a common jurisdiction: they may be searched in the waters of the searching power; because the permission to resort to its ports (whether implied or

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opposite to where men of war ride. The deputy vice-admiral of Pembrokeshire said, that he had of late employed his water-bailiffs to execute process in that part of the haven, but there was no evidence either way, as to the execution of the common-law process there. The court, upon this evidence, left the case to the jury, with observations as to the situation of the place, whether it was within the jurisdiction or not, and the jury found the prisoner guilty; but the case was saved for the opinion of the twelve judges. The question was, whether the place where the murder was committed, was to be considered as within the limits to which commissions, granted under the statute 28 Hen. VIII., c. 15, for the trial of the offences therein mentioned, "committed in or upon the sea, or in any other haven, river, creek or place, where the admiral or admirals have or pretend to have power, authority or jurisdiction," do by law extend. The judges, with the exception of Mr. Justice GROSE, all assembled on the 23d of December 1812, at Lord Ellenborough's chambers, to consider this question, and they were unanimously of opinion, that the trial was properly had, and that there was no objection to the conviction, on the ground of any supposed want of jurisdiction in the commissioners, appointed by commission under the statute 28 Hen. VIII., c. 15, in respect of the place where the offence was committed. During the discussion of this point, the construction of this statute by Lord Hale, in his Pleas of the Crown, was much preferred to the doctrine of Lord Coke, in his Institutes, and most, if not all the judges, seemed to think, that the common law had a concurrent jurisdiction in this haven; and in other havens, creeks and rivers in this realm." 2 Leach's Crown Cases 1093, Case 353 (4th ed. 1815).

express), does not import any exemption from the local *jurisdiction. The *Exchange*, 7 Cranch 144. The latter (*i. e.*, public vessels) may not be searched anywhere, neither in the ports which they enter, nor on the high seas. Not in the ports which they enter; because the permission to enter implies an exemption from the jurisdiction of the place. Nor on the high seas; because the common jurisdiction which all nations have thereon does not extend to a public ship of war, which is subject only to the jurisdiction of the sovereign to which it belongs. Every argument by which this exemption is sustained, as to foreign states, applies with equal force as between the United States and every particular state of the Union; and it is fortified by other arguments drawn from the peculiar nature and provisions of our own municipal constitution. The sovereignty of the United States and of Massachusetts are not identical; the former have a distinct sovereignty, for separate purposes, from the latter. Among these is the power of raising and maintaining fleets and armies for the common defence and the execution of the laws. If any particular state had it in its power to intermeddle with the police and government of an army or navy thus raised, upon any pretext, there would be an end of the exclusive authority of the United States in this respect. Wars and other measures, unpopular in particular sections of the country, might be impeded in their prosecution, by the interference of the state authorities. Such a conflict of jurisdictions must terminate in anarchy and confusion; but the court will take care that
*375] no such *conflict shall arise. The judiciary act of 1789, ch. 20, § 11, giving to the circuit courts cognisance of all crimes and offences cognizable under the authority of the United States, and the statute of 1790, ch. 9, declaring, that "if any person shall commit, upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular state, murder, &c., he shall, on conviction, suffer death," and that, "if any person or persons shall, within any fort, &c., or in any other place or district of country, under the sole and exclusive jurisdiction of the United States, commit the crime of wilful murder, such person or persons, on being thereof convicted, shall suffer death;" and a public ship of war, as well as the space of water she occupies, being "out of the jurisdiction of any particular state," and being "a place" under the sole and exclusive jurisdiction of the United States," it follows, that the circuit court of Massachusetts district had exclusive cognisance of this offence, which was committed out of the jurisdiction of any particular state, and in a place under the sole and exclusive jurisdiction of the United States.

Webster, in reply.—The argument on the part of the United States is, that the circuit court has jurisdiction, first, because the murder was committed on board a national ship of war, in which no state can exercise jurisdiction; inasmuch as ships of war are considered as parts of the territory of the government to which they belong, and no other government can take cognisance of offences committed in them. Two answers may be given to this argu-
*376] ment. *The first is, that the main inquiry being, whether the circuit court has jurisdiction, and the jurisdiction of that court being only such as is given to it by the act of congress, it is sufficient to say, that no act of congress authorizes that court to take cognisance of any offences, merely because committed on ships of war. Whether congress might have done this,

or might not, it is clear, that it has not done it. It is the nature of the place in which the ship lies, not the character of the ship itself, that decides the question of jurisdiction. Was the "haven" in which the murder was committed, within the jurisdiction of Massachusetts? If so, no provision is made by the act for punishing the offence in the circuit court. The law does not inquire into the nature of the employment or service in which the offender may have been engaged, at the time of committing the offence: but only into the local situation or territory where it was committed. If committed within the territorial jurisdiction of a state, it excludes the jurisdic- of the circuit court, by express words of exception. If, therefore, it has been shown, that this haven or harbor is within the limits of Massachusetts, and under the general common-law jurisdiction of that state, the offence being committed in that harbor, cannot be tried in the circuit court. The second answer is, that the doctrict contended for is applicable only between one sovereign power and another; a relation in which the government of the United States does not stand towards the state governments. Whenever ships of war of the United States are within the country in the ports or harbors of any state, they *are to be considered as at home. They are not then [*377
in foreign ports or harbors, and the jurisdiction of the state is, as to them, a domestic jurisdiction. If this be not so, persons on board such ships, though in the bosom of their own country, would be, in most cases, subject to no civil jurisdiction whatever. Even persons committing offences on land might flee on board such ships, and escape punishment, if they could not be followed by state process. The doctrine contended for would go to a great length. The cases cited speak of armies as well as ships of war; and the doctrine, if applicable in the latter case, is equally so in the former. How, then, are offences to be punished, if committed by persons attached to the army of the United States, while in their own country? It is admitted, that in England, such offenders are punished in the courts of common law; and the act of congress, establishing the articles of war, also provides expressly that any officer or soldiers accused of a capital or other crime, such as is punishable by the known laws of the land, shall be delivered to the civil magistrate, in order to be brought to trial. What civil magistrate is here intended? It must necessarily be such magistrate as acts under state authority, because no provision is made for the trial of such offenders in the courts of the United States. Perhaps, such provisions might be made by congress, relative as well to offences committed by soldiers in the army, as by seamen in the navy, under the general power to establish rules for the government of the army and navy. But no such provision has hitherto been made. State process, on the contrary, has been constantly *served and [*378
obeyed, in cases proper for the interference of the civil authority, both in the army and navy. Writs of *habeas corpus*, issued by state judges, have been served on and obeyed by, military officers in their camps and naval commanders on their quarter-decks. *Matter of Stacey*, 10 Johns. 310. To all these purposes, the state courts are considered as parts of the general system of judicature established in the country. They are not regarded as foreign, but as domestic tribunals. The consequences, which it has been imagined, might follow from the exercise of state jurisdiction in these cases, are hypothetical and possible only. Hitherto, no inconvenience has been experienced. In most instances which might occur, this court would

have a power of revision: and if, in other instance, inconvenience should be felt, it must be attributed to that distribution and partition of power, which the people have made between the general and state governments. It would be a strange inconsistency, to hold the states to be foreign powers in relation to the government of the United States, and to apply to them the principles of the cases cited, and to hold their courts to be judicatures existing under a foreign authority; when the judgments of those courts are not only treated here as judgments of the courts of the United States are treated, but when also congress has referred to them the execution of many laws of the general government, and when appeals from their decision are constantly brought in the provided cases, into this court, by writ of error.

*379] It is also insisted, *on the other side, that this is a case of admiralty and maritime jurisdiction. It is not a case of exclusive admiralty jurisdiction, if that jurisdiction is to be defined and limited, in its application to the case, by the general principles of the English law. And not only must the common law be resorted to, for the interpretation of the technical terms and phrases of that science, as used in the constitution, but also for ascertaining the bounds intended to be set to the jurisdiction of other courts. In other words, the framers of the constitution must be supposed to have intended to establish courts of common law, of equity, and of admiralty, upon the same general foundations, and with similar powers, as the courts of the same descriptions, respectively, in that system of jurisprudence with which they were all acquainted. Is there any doubt, what answer they would have given, if they had been asked, whether it was their purpose to include in the admiralty and maritime jurisdiction, such cases only as had been tried by the courts of that jurisdiction for a century, or whether they intended to confer the admiralty jurisdiction, as the civilians contend it existed before the time of Richard the Second?

It is said, however, that there has been a practical construction given to this provision of the constitution, as well by congress as the courts of law, which has, in one instance, at least, and that a very important one, departed from the limit assigned to the admiralty by the common law. This refers to seizures for the violation of the laws of trade and of the revenue; which seizures, although made in ports and harbors, and within the bodies of coun-

*380] ties, are *holden to be of admiralty jurisdiction, although such certainly is not the case in England. The existence of this exception must be admitted. The act to establish the judicial courts provides, that the district court "shall have exclusive original cognisance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade, where the seizures are made on waters navigable from the sea, &c." Perhaps, this act need not necessarily be so construed as to consider such seizures to be of admiralty jurisdiction, if they were not such before. The word "including" might refer to the general powers of the court, and not to the words immediately preceding, viz., "admiralty and maritime jurisdiction." But, then, such seizures, like other civil causes, are, by the constitution, to be tried by jury, unless they be of admiralty and maritime jurisdiction; and it must be admitted, that this court has repeatedly decided, that they are of admiralty jurisdiction, and are not to be tried by jury. The first case is that of *La Vengeance*. The opinion of the court

was delivered in this case, without giving the reasons upon which it was founded. 3 Dall. 297. The next is *The Sally*, 2 Cranch 406. This was decided without argument, and expressly on the authority of the preceding case. The point was made again, in the *United States* v. *The Betsey and Charlotte*, 4 Cranch 443, and decided as it had been before; the court considering the law to be completely settled by the case of the *The Vengeance*. Two subsequent cases, *The Samuel* and *The Octavia*, 1 Wheat. 9, 20, have *been disposed of in the same manner. As was said in the argument of the case last cited, the arguments urged against the doctrine, in [*381 all the cases subsequent to *The Vengeance*, have always been answered by a reference to the authority of that case. As these cases have all been decided, without any exhibition of the grounds and reasons on which the decisions rest, they afford little light for analogous cases. They show, that in one respect, admiralty jurisdiction is here to be taken to be more comprehensive than it is in England. It will not follow, that it is to be so taken in all respects. If this were to follow, it would be impossible to find any bound or limit at all.

It is admitted, that this exception from the English doctrine of admiralty jurisdiction does exist here. But if distinct and satisfactory reasons for the exception can be shown, this will rather strengthen than invalidate the general proposition. Such reasons may, perhaps, be found in the history of the American colonies, and of the vice-admiralty courts established in them by the crown. The first and grand object of the English navigation act (12 Car. II.) seems to have been the plantation trade. Reeves on Shipping 45. It was provided by that act, that none but English ships should carry the plantation commodities; and that the principal articles should be carried only to the mother country. By the subsequent act of 15 Car. II., the supplying of the plantations with European goods was meant to be confined wholly to the mother country. Strict rules were laid down to secure the due *execution of these acts, and heavy penalties imposed on such as [*382 should violate them. Other statutes to enforce the provisions of these were passed, with other rules, and new penalties, in the subsequent years of the same reign. "In this manner was the trade to and from the plantations tied up, almost for the sole and exclusive benefit of the mother country. But laws which made the interest of a whole people subordinate to that of another, residing at the distance of three thousand miles, were not likely to execute themselves very readily; nor was it easy to find many upon the spot who could be depended upon for carrying them into execution." Ibid. 55. In fact, these laws were, more or less, evaded or restricted in all the colonies. To enforce them was the constant endeavor of the government at home; and to prevent or elude their operation, the constant object of the colonies. "But the laws of navigation were nowhere disobeyed and contemned so openly as in New England. The people of Massachusetts Bay were, from the first, disposed to act as if independent of the mother country; and having a governor and magistrates of their own choice, it was very difficult to enforce any regulations which came from the English parliament, and were adverse to their colonial interest." Ibid. 57. No effectual means of enforcing the several acts of navigation and trade had been found, when, in 1696, the act of 7 & 8 Wm. III., ch. 22, was passed, for preventing frauds, and regulating abuses in the plantation trade. This act gave a new

*body of regulations; and among other things because great difficulty had been experienced in procuring convictions, new qualifications were required for jurors who should sit in causes of alleged violation of the laws; and the officer or informer might elect to bring his prosecution in any county within the colony. All these correctives were of little force, so that the government soon after, with the view of securing the execution of this and the other acts of trade and navigation, proceeded to institute courts of admiralty. Ibid. 70. These courts appear to have claimed jurisdiction in causes of alleged violation of the laws of trade and navigation, upon the construction of this act of 7 & 8 Wm. III. In 1702, the Board of Trade, "being doubtful," as they say, "of the true jurisdiction of the admiralty," desired to be informed by the attorney and advocate-general (Sir Edward Northey and Sir John Cooke), "whether the courts of admiralty, in the plantations, by virtue of the 7 & 8 of King William, or any other act, have there any further jurisdiction than is exercised in England? Whether the courts of admiralty, in the plantations, can take cognisance of questions which arise concerning the importation or exportation of any goods to or from them, or of frauds in matters of trade? And in case a vessel sail up any river, with prohibited goods, intended for the use of the inhabitants, whether the informer may choose in what court he will prosecute—in the court of admiralty, or of common law?" The opinion of the attorney-
*384] general was, that "the act (7 & 8 Wm. III.) *gave the admiralty court in the plantations, jurisdiction of all penalties and forfeitures for unlawful trading, either in defrauding the king in his customs, or importing into, or exporting out of, the plantations, prohibited goods; and of all frauds in matters of trade, and offences against the acts of trade, committed in the plantations:" and he mentions the case of *Colonel Quarry*, judge of the admiralty, in Pennsylvania, then pending in the queen's bench, in which a judicial decision on the point might be expected. The opinion of the advocate-general was, of course, equally favorable to the admiralty jurisdiction. 2 Chalmer's Opinions 187, 193. On this construction of the statute, the courts of admiralty in the colonies assumed jurisdiction over causes arising from violation of the laws of trade and of revenue; "and from this time," says Mr. Reeves, "there seems to have been a more general obedience to the acts of trade and navigation." This jurisdiction continued to be exercised by the colonial courts of admiralty, down to the period of the revolution; and is still exercised by the courts of those colonies, which retain their dependence on the British crown. 2 Bro. Civ. & Adm. Law 492: 2 Rob. 248.

This may be the ground on which it has been supposed that the states of the Union, in forming a new government, and granting to it jurisdiction in admiralty and maritime causes, might be presumed to have included in the grant, the authority to take cognisance of causes arising from the violation
*385] of the laws relative to customs, navigation and *trade. All the colonies had seen this authority exercised as matter of admiralty jurisdiction. It was not peculiar to the courts of any one of them, but common to all; it had been engrafted on the original admiralty powers of these courts, for near a century. They were familiar to the exercise of this jurisdiction, as an admiralty jurisdiction. It had been incorporated with their admiralty jurisdiction, by statute; and they had long regarded it as a part of the

ordinary and established authority of such courts. There might be reason, then, for supposing, that those who made the constitution, intended to confer this power as they found it. And if any other exception to the English definition, and limitation of the power of courts of admiralty, can be found to have been as early adopted, as uniformly received, as long practised upon, and as intimately interwoven with the system of colonial jurisprudence, there will be equal reason to believe, that the framers of the constitution had regard to such exception also. Such exceptions do not impeach the rule; on the contrary, their effect is to establish it. If the exception, when examined, appears to stand on grounds peculiar to itself, the inference is, that where no peculiar reasons exist for an exception, such exception does not exist. In the case before the court, no reason is given, to induce a belief that an exception does exist. No practice of excluding the common-law courts from the cognisance of crimes, committed in ports and harbors, is shown to have existed in any colony. There can be no doubt, therefore, that, saving such *exceptions as can be reasonably accounted for, the admiralty jurisdiction was intended to be given to the courts of the [*386 United States, in the extent, and subject to the limits, which belonged to it in that system of jurisprudence with which those who formed the constitution were well acquainted.

February 21st, 1818. MARSHALL, Ch. J., delivered the opinion of the court.—The question proposed by the circuit court, which will be first considered, is, whether the offence charged in this indictment was, according to the statement of facts which accompanies the question, "within the jurisdiction or cognisance of the circuit court of the United States for the district of Massachusetts?"

The indictment appears to be founded on the 8th section of the "act for the punishment of certain crimes against the United States." That section gives the courts of the Union cognisance of certain offences committed on the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular state. Whatever may be the constitutional power of congress, it is clear, that this power has not been so exercised, in this section of the act, as to confer on its courts jurisdiction over any offence committed in a river, haven, basin or bay; which river, haven, basin or bay is within the jurisdiction of any particular state. What then is the extent of jurisdiction which a state possesses? We answer, without hesitation, the jurisdiction of *a state is co-extensive with its territory; co-extensive with [*387 tsilegislative power. The place described is unquestionably within the original territory of Massachusetts. It is, then, within the jurisdiction of Massachusetts, unless that jurisdiction has been ceded to the United States.

It is contended to have been ceded, by that article in the constitution, which declares, that "the judicial power shall extend to all cases of admiralty and maritime jurisdiction." The argument is, that the power thus granted is exclusive; and that the murder committed by the prisoner is a case of admiralty and maritime jurisdiction. Let this be admitted. It proves the power of congress to legislate in the case; not that congress has exercised that power. It has been argued, and the argument in favor of, as well as that against, the proposition, deserves great consideration, that courts of common law have concurrent jurisdiction with courts of admiralty,

over murder committed in bays, which are inclosed parts of the sea; and that for this reason, the offence is within the jurisdiction of Massachusetts. But in construing the act of congress, the court believes it to be unnecessary to pursue the investigation, which has been so well made at the bar, respecting the jurisdiction of these rival courts.

To bring the offence within the jurisdiction of the courts of the Union, it must have been committed in a river, &c., out of the jurisdiction of any state. It is not the offence committed, but the bay in which it is committed,
*388] which must be out of the jurisdiction *of the state. If, then, it should be true, that Massachusetts can take no cognisance of the offence; yet, unless the place itself be out of her jurisdiction, congress has not given cognisance of that offence to its courts. If there be a common jurisdiction, the crime cannot be punished in the courts of the Union.

Can the cession of all cases of admiralty and maritime jurisdiction be construed into a cession of the waters on which those cases may arise? This is a question on which the court is incapable of feeling a doubt. The article which describes the judicial power of the United States is not intended for the cession of territory, or of general jurisdiction. It is obviously designed for other purposes. It is in the 8th section of the 2d article, we are to look for cessions of territory and of exclusive jurisdiction. Congress has power to exercise exclusive jurisdiction over this district, and over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings. It is observable, that the power of exclusive legislation (which is jurisdiction) is united with cession of territory, which is to be the free act of the states. It is difficult to compare the two sections together, without feeling a conviction, not to be strengthened by any commentary on them, that, in describing the judicial power, the framers of our constitution had not in view any cession of territory, or, which is essentially the same, of general jurisdiction.

It is not questioned, that whatever may be necessary to the full and
*389] unlimited exercise of admiralty *and maritime jurisdiction, is in the government of the Union. Congress may pass all laws which are necessary and proper for giving the most complete effect to this power. Still, the general jurisdiction over the place, subject to this grant of power, adheres to the territory, as a portion of sovereignty not yet given away. The residuary powers of legislation are still in Massachusetts. Suppose, for example, the power of regulating trade had not been given to the general government. Would this extension of the judicial power to all cases of admiralty and maritime jurisdiction, have divested Massachusetts of the power to regulate the trade of her bay? As the powers of the respective governments now stand, if two citizens of Massachusetts step into shallow water, when the tide flows, and fight a duel, are they not within the jurisdiction, and punishable by the laws, of Massachusetts? If these questions must be answered in the affirmative, and we believe they must, then the bay in which this murder was committed is not out of the jurisdiction of a state, and the circuit court of Massachusetts is not authorized, by the section under consideration, to take cognisance of the murder which has been committed.

It may be deemed within the scope of the question certified to this

court, to inquire, whether any other part of the act has given cognisance of this murder to the circuit court of Massachusetts? The third section enacts, "that if any person or persons shall, within any fort, arsenal, dock-yard, magazine, or in any other place or district of country, under the sole and exclusive jurisdiction of the *United States, commit the crime of [*390 wilful murder, such person or persons, on being thereof convicted, shall suffer death." Although the bay on which this murder was committed might not be out of the jurisdiction of Massachusetts, the ship of war on the deck of which it was committed, is, it has been said, "a place within the sole and exclusive jurisdiction of the United States," whose courts may, consequently, take cognisance of the offence.

That a government which possesses the broad power of war; which "may provide and maintain a navy;" which "may make rules for the government and regulation of the land and naval forces," has power to punish an offence committed by a marine on board a ship of war, wherever that ship may lie, is a proposition, never to be questioned in this court. On this section, as on the 8th, the inquiry respects, not the extent of the power of congress, but the extent to which that power has been exercised.

The objects with which the word "place" is associated, are all, in their nature, fixed and territorial. A fort, an arsenal, a dock-yard, a magazine, are all of this charter. When the sentence proceeds with the words, "or in any other place or district of country, under the sole and exclusive jurisdiction of the United States," the construction seems irresistible, that, by the words "other place," was intended another place of a similar character with those previously enumerated, and with that which follows. Congress might have omitted, in its enumeration, some similar place, within its exclusive jurisdiction, *which was not comprehended by any of the terms [*391 employed, to which some other name might be given; and therefore, the words "other place," or "district of country," were added; but the context shows the mind of the legislature to have been fixed on territorial objects of a similar character.

This construction is strengthened by the fact, that, at the time of passing this law, the United States did not possess a single ship of war. It may, therefore, be reasonably supposed, that a provision for the punishment of crimes in the navy might be postponed, until some provision for a navy should be made. While taking this view of the subject, it is not entirely unworthy of remark, that afterwards, when a navy was created, and congress did proceed to make rules for its regulation and government, no jurisdiction is given to the courts of the United States, of any crime committed in a ship of war, wherever it may be stationed.(a) Upon these reasons, the court is of opinion, that a murder committed on board a ship of war, lying within the harbor of Boston, is not cognisable in the circuit court for the district of Massachusetts; which opinion is to be certified to that court.

(a) This, it is conceived, refers to the ordinary courts of the United States, proceeding according to the law of the land. The crime of murder, when committed by any officer, seaman or marine, belonging to any public ship or vessel of the United States, without the territorial jurisdiction of the same, may be punished with death, by the sentence of a court-martial. Act of 1803, for the better government of the navy, ch. 187, § 1, art. 21. But the case at bar was not cognisable by a navy court-martial, being committed within the territorial jurisdiction of the United States.

The opinion of the court, on this point, is believed to render it unnecessary to decide the question respecting the jurisdiction of the state court in the case.

Certificate accordingly.

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*392] *The ÆOLUS: WOOD, Claimant.

Non-importation law.

A question of fact under the non-importation laws: Defence set up, on the plea of distress, repelled: Condemnation.

APPEAL from the Circuit Court for the district of Massachusetts. The vessel and cargo were libelled in the district court for the district of Maine, as forfeited to the United States, for lading on board, at Liverpool, in Great Britain, certain goods which were of the growth, produce and manufacture of Great Britain, with intent to import the same into the United States, and with the knowledge of the master; and also for an actual importation of the same into the United States. The seizure was made at Bass Harbor, in the district of Frenchman's Bay, by Meletiah Jordan, collector of that district.

A petition was interposed by Joseph T. Wood, of Wiscasset, who styled himself agent of Peter Molus *and Israel Rosnel, both of Bjornburgh, *393] in Finland, in Russia, and also of Frantz Scholts, of Archangel, in Russia, merchants, and subjects of the emperor of Russia. The petition stated that Molus, Rosnel and Scholtz were owners of the brig and cargo; that she sailed from Liverpool, in the beginning of December 1813, with a cargo bound to the Havana, with liberty and instructions to touch at some port in North America, to ascertain whether, according to existing laws, they could be admitted to an entry, and if not, to receive such orders as the agent of the owners might give. That after a long passage of 76 days, and experiencing severe weather, and the vessel being in a leaky conditian, and the provisions growing short, she was compelled to make Bass Harbor. That there was some expectation, at Liverpool, when the Æolus sailed, that a treaty of peace between the United states and Great Britain had been concluded, or was in great forwardness. The petition prayed that the vessel and cargo might be restored to Mr. Wood, on his giving bail for the appraised value.

This claim was filed the 14th of February 1814. At the May term following, Molus & Rosnel claimed the brig as their property, and Scholtz claimed the cargo as belonging to himself. In February term 1815, a rule was made on the claimants to produce the log-book, at the trial, and an original letter to J. T. Wood, mentioned in the deposition of the supercargo.

Montero, mate of the brig, swore, that she sailed direct from Liverpool to the United States. The master, *on the passage, told him, that *394] the vessel was bound to the United States. The master and supercargo said, it was their intention to have gone to Wiscasset or Portland, where they were to discharge, but owing to the bad state of their rigging, and the wind being ahead, they put into Mount Desert, where they were detained by the custom-house officer. He also stated, that it was agreed, in Liverpool, with all the sailors, himself and the cook excepted, that they

should come to the United States, and return from thence to Liverpool. About three months after, the mate was examined again, when he told a story so different from the relation which is found in his first deposition, that but little credit is due to him as a witness for either party.

Lingman, one of the mariners of the Æolus, swore, that he was shipped on board that vessel, in October last, she then lying in Liverpool, on a voyage to some port in America, and from thence back to some port in Europe.

Daniel Molus, master of the Æolus, testified, that, in October 1813, he came to Liverpool, from Bjornburgh, in the brig Æolus. One Lourande, who was master of the brig, having a power to charter her as he might think proper, did charter her to Frantz Scholtz, of Archangel, by his agent, David Morgan, on a voyage to the Havana, and a port in North or South America. He was ordered by Morgan, the agent of Scholtz, to proceed with the brig to the Havana, and call off such ports as the supercargo should direct. On the 5th of December 1813, the brig left Liverpool. *Two days after, he was ordered by the supercargo to proceed off the port [*395 of Wiscasset, and land some passengers, when he would receive further orders from the supercargo, who expected to find further orders there. On their passage, the brig had thirteen of her chains broken, some of them in the eye round the bolt, and therefore, could not be repaired until some of the cargo was discharged. Five of her shrouds were carried away, the bolts in the heel of her bowsprit were broken, and the bowsprit came some in upon deck. The stern-boat was, by a sea, stove in pieces at the stern, and lost, with several light sails which had been thrown into her. The sprit-sail yard was lost; her waist-rails and boards were wholly carried away by the sea. The binnacle was several times capsized, and the compasses very much injured. One of the passengers was lost overboard. The brig was short of water; and at the time of her arrival on the American coast, the crew was in very great distress, being on a short allowance of water, which was very thick and bad, and not fit to be used, until it was boiled, to make it thin. There was no rigging to repair the vessel any longer. On the 17th of February 1814, a council of the whole ship's crew and passengers was held, and all were of opinion, it was very dangerous keeping longer at sea, and were for getting into the first port which could be made. The supercargo reluctantly consented. If he had not, the brig must have gone in, as her condition would have justified the act. In the afternoon of the 18th of February 1814, the Æolus anchored *in Bass Harbor, after a passage [*396 of 75 days, in which every hardship had been experienced. The vessel was a complete wreck, and the strength and spirit of the crew nearly exhausted. She was immediately seized by the custom-house officer, and the papers all delivered up. Shortly after, the supercargo received advice from his agent, who soon came on board himself. This witness spoke of a survey of three ship-masters, and of their opinion; but as no such survey was found in the proceedings, it is presumed that none was made; or, if made, reduced to writing. He further stated, that the brig had been repaired while at Bass Harbor, at an expense of near $3000. The cargo was the sole property of Mr. Scholtz, of Archangel, and was put on board by his agent, David Morgan, of London, who employed Richards, Ogden & Selden, as brokers for that purpose.

Frederic Williams testified, that he was supercargo; that the brig was

Russian—expected in England, that the non-importation law would be soon repealed. His orders were to proceed to Havana, and to call off Wiscasset, where he would receive orders from Joseph Wood, agent of Mr. Scholtz, and if restrictions were removed, to enter with the brig; if otherwise, to proceed to the Havana; had much tempestuous weather, carried away most of their chains, and many of the shrouds. On the arrival of the brig at Bass Harbor, he wrote to Wood, that the brig had been seized, and consulting him what had best be done. He gave up his papers to the deputy-marshal, and took a receipt for them. Wood wrote to him, and also
*397] came down to the brig himself, and informed *him that the vessel had been seized for an alleged violation of the non-importation law. He received his instructions as supercargo, from Morgan, the agent of Scholtz, in London, and they were verbal instructions only. He did not recollect, that he had ever received any letter, either from Morgan or Scholtz, concerning this voyage. He was a native of Massachusetts, but had not resided in the United States for about four years previous to the commencement of this voyage. Since the arrival of the Æolus, he had resided nearly two years in New York. All the papers he had were receipts from the cartmen in Liverpool, and they were bundled together in the cabin, from which place he took them and delivered them to Wood, who he presumed had them.

It appeared by the testimony of Robert Kelly, that Wood informed him, in the beginning of February 1814, that he expected a brig from the West Indies, and a Russian brig to call off the mouth of Sheepscot river for orders, and to know whether they could enter. He desired Kelly, by letters which are produced, to keep a good look-out for these vessels, to direct the one from the West Indies to proceed to Newport, and to inform the master or supercargo of the Russian brig, that the laws would not admit of his entering, unless he was in want of something, in which case he might put into the mouth of the river. Kelly cruised off the mouth of the river, for about four weeks, when he heard from Wood, that the Russian vessel had put into Mount Desert, and was seized.

Thomas Rice related a conversation which he overheard, between Wood
*398] and a Mr. Pepper, in *which the former offered the latter a handsome present, to swear that he had been offered money by Haddock and Jordan, to give testimony against the brig, and in which Wood also stated, that he had offered the mate money, to contradict the testimony he had given for Jordan.

John Bridges swore, that being in Liverpool, in November, 1813, with six other Americans, they were applied to by Mr. Richards, of the house of Ogden, Richards & Selden, who offered to find them clothes, to pay their board while at Liverpool, and to find them a passage to America. He accordingly supplied them with clothes, paid their board eight weeks, and then put them on board the Russian brig Æolus, in which they sailed for Portland.

Samuel Haddock, jun., an inspector of the customs, went on board of the brig, when she came into Bass Harbor, and demanded her papers of the supercargo, which he refused to give up, as he was determined to proceed farther to the westward. He understood from the mate, that the supercargo had taken the bills of the cargo from him and burnt them. He thought the

brig might have preceeded on her voyage to the Havana, when she came into Bass Harbor, with such repairs as might have been made on board. None of the officers complained or intimated to him, that the brig had come into Bass Harbor in distress, nor did they pretend that the cargo was damaged, until they began to break bulk.

By another witness, it appeared, that after the seizure, the master of the Æolus, in company with the mate, purchased of him a chart of the Amelia islands, Havana, *and the coast adjacent, observing that he had no idea of going such a voyage when he left England, or he should have provided himself with one. [*399

Abraham Richardson was put on board the brig, as an inspector of the customs, when she was seized, and continued on board, until the cargo was discharged, which was about 25 days. He overheard a conversation between Wood and the supercargo, in the state-room of the latter, in which Wood expressed a wish that the brig had got to Wiscasset, as he told the collector at that place, that the brig was coming, and that he had offered him $10,000 if he would let her enter. He observed, that the collector did not tell him whether he would, but he believed, that if the vessel had put in there, they would have got her off very easy. The supercargo observed to Wood, that if it was known that he, Wood, was concerned in the voyage, it would condemn vessel and cargo. Wood replied, "You must be very careful not to drop a word about it; we must make it out Russian property, if we can." The supercargo then remarked, that if the collector would not clear out the brig for Wiscasset, they must make her out as bad as possible, so that she could not be moved, and then bond the cargo; upon which Wood observed, that if it was condemned, they should then make a good voyage, as the bonds would not be much more than the double duties. This witness heard no complaints on board of any distress, and believed the Æolus might have proceeded to the West Indies.

*The papers on board represented the vessel and cargo as Russian property. On this testimony, the property was condemned as forfeited to the United States, from which sentence the claimants appealed to this court. [*400

February 18th. *D. B. Ogden* and *Wheaton*, for the appellants and claimants, argued, upon the facts, that the cargo was not put on board with intent to import the same into the United States, but that the primary destination was to the Havana, with orders to call off the coast of this country, and to enter, in case the non-importation laws should be repealed. But even if the fact were ever so well established, that the cargo was originally put on board, with intent to import it into the United States, congress could not, consistently with the principles of universal law, forfeit the property of foreigners, for an act done by them in a foreign port. The putting on board the prohibited commodities, with intention to import, is made a distinct, substantive offence, by the 5th section of the act of the 1st of March 1809, ch. 195. This offence was consummated within a foreign territory. If the vessel had been captured on the high seas, before her arrival in the United States, she would have been taken *in delicto*, according to any construction by which this section can be applied to foreigners. The legislature might, indeed, intend to confiscate the property of our own citizens, for acts done by

them in foreign countries, because their allegiance travels with them wherever they go. But the operation of a statute is generally limited to the
*401] territory, or the *subjects of the country where it is made. Casaregis, Disc. 130, § 14–22. This section of the act may stand consistently with this construction; but it will be confined in its operation to the conduct of our own citizens. The subsequent coming into the waters of the United States was occasioned by a *vis major*, and did not constitute an importation in law. To constitute such an importation, there must be a voluntary arrival within a port. An involuntary arrival is not an importation; nor an arrival with the jurisdictional limits merely; there must be a voluntary arrival within some port, or collection district, with intent to unlade. Reeves' Law of Shipping 203–7; *The Eleanor*, Edw. 161; *The Paisley*, Ibid. app. 117; *The Mary*, 1 Gallis. 206; *United States* v. *Arnold*, Ibid. 358; s. c. 9 Cranch 104; *The Blaireau*, 4 Ibid. 355, note; *The Fanny*, 9 Ibid. 118.

The *Attorney-General* and *Preble*, contrà, argued, upon the facts, that the primary destination was to the United States, and that the distress set up as a plea to justify the fact of importation, was fictitious, or created by the act of the parties themselves.

February 27th, 1818. LIVINGSTON, Justice, delivered the opinion of the court, and after stating the case, proceeded as follows:—It is not necessary or important on this occasion, to inquire into the national character of the Æolus, or to ascertain in whom the proprietary interest of the cargo resided,
*402] at the time of seizure; because, whether *Russian, British or American, they are both equally liable to forfeiture, if the offence stated in the libel has been committed. The cargo, being avowedly of the growth, produce or manufacture of Great Britain, it is conceded, that a forfeiture must follow, if the fact of a voluntary importation into the United States be made out. Yet, in deciding this question, it is impossible to discard entirely from view some of the circumstances which preceded, and took place after the arrival of this vessel at Bass Harbor, which, although not immediately connected with any calamity which may have brought her there, are not at all calculated to excite much sympathy, or to call for any extraordinary exertion of credulity, while listening to the tale of distress, on which every hope of restitution is now rested.

Mr. Scholtz, a Russian merchant at Archangel, in time of war between this country and Great Britain, and during the existence of our non-importation act, loads, at that place, no less than five brigs, with the products of Russia, which he commits to the care of Mr. Morgan, a merchant at Liverpool, with instructions, as is said, to invest the proceeds of those cargoes in such British manufactures as he might judge suitable for sale in the Havana. Mr. Morgan, who, at or about the time of loading these vessels, was at Archangel, proceeds to Liverpool, disposes of the cargoes there, charters the Russian brig Æolus, and dispatches her for the Havana, to the address of certain merchants there, who are informed by a letter from him, of the origin of this adventure, and that he has sent to them a cargo, in conformity
*403] with the orders *of his principal, which he begs them to sell at good, or even saving prices, and after investing the proceeds in certain produce, to load the Æolus, and send her to Mr. Scholtz, at Archangel. The

instructions of Mr. Scholtz, in an affair of so much magnitude, nowhere appear in the proceedings; but if they were, in truth, of the kind stated by Mr. Morgan himself, in his letter, which has just been referred to, we shall find there was a total departure from them; for not only was the cargo of the Æolus the most unsuitable which could have been selected for a warm climate; but the Havana, to which alone, by his own account, he was to send the Æolus, was to be her port of destination, only in case she could not enter a port of the United States. When we find so great a departure from instructions, as would inevitably fix upon the agent a responsibility to the whole extent of the property committed to his charge, we may well be permitted to doubt of their existence altogether, and to suspect that Mr. Morgan is acting in the character of a principal, and not, as he would have us believe, in that of a humble subordinate agent. This suspicion is not diminished, when we find, that although this suit has been pending between two and three years, Mr. Scholtz has not interfered with it, either in person, nor has he thought it worth his while to appoint any agent for that purpose.

After the purchase of a cargo, principally calculated for a northern market, and worth not less than $104,311.57, it is committed to a supercargo, to whom no other than verbal instructions are given. This gentleman styles himself a commissioned *officer in the imperial navy of Russia; and on his arrival in the United States, can speak nothing but broken [*404
English. He proves, however, to be a natural-born citizen of Massachusetts, who had been absent from his country not more than four years, and who, therefore, as well may be supposed, was not long in recovering his vernacular tongue, which we soon find him speaking with as much facility as if he had never been absent from his native state. Mr. Williams, for that is the name of the supercargo, is directed by Mr. Morgan to call off Wiscasset, where he would receive orders from Mr. Wood, who, it seems, although it does not appear how, was fully apprised of the destination of this vessel, and of the time when she would probably be in his neighborhood. Whence he derived this knowledge, or when, he has not deigned to inform the court, and although claiming so valuable a property for the owners of vessel and cargo, he has shown no authority whatever from either of them, for interfering in this way; and when, after the lapse of more than two years and a half from the first institution of proceedings in the district court, interrogatories are addressed to him, for the purpose of discovering who were the real owners of this property, and whether they had appointed him, and when, as their attorney, and some other matters which he alone could have rescued from the mystery in which they are now involved, he produces no authority whatever, and contents himself with informing the commissioners, that being agent of the claimants, he thinks it improper, at that *time, [*405
to answer any interrogatories, and shall, therefore, decline doing so.

The Æolus leaves Liverpool, without being furnished with a chart of the Havana, or the coast adjacent, and two days after her departure, the master is ordered by the supercargo to proceed off the port of Wiscasset, which was accordingly done, and all idea of going to the Havana, if any were ever entertained, appears, from that moment, to be abandoned; and she is accordingly found, after a boisterous and long winter's passage, in a high latitude, off the American coast. Now, if there be nothing criminal in a vessel coming on our coast, with a *bonâ fide* intention of ascertaining whether, under

existing laws, she would be permitted to an entry; yet, when a vessel is found in this situation, in a boisterous season of the year, and so very much out of the way of the place to which it was pretended she was destined, if our ports were shut, and then relies on the plea of distress for coming in, a court will require the most satisfactory proof of the necessity which is urged in her defence.

To make out this necessity, the principal, if not the only witnesses produced, are the master and supercargo. Out of fifteen persons, these two are selected, and relied on to establish this all-important fact. No survey is had of the vessel or cargo, either before or after it was discharged. To these two witnesses, if they stated a sufficient distress, which is not conceded, very serious objections lie. The master is so much implicated in all transactions of this nature, that it must always be more or less hazardous for a *406] claimant *to resort to his testimony, when other and less exceptionable witnesses are at hand. Not only some of the seamen on board might have been examined; but why not call on persons residing at the place where the vessel discharged, to examine her, and to give their testimony? Such persons were at hand, for the master speaks of three ship-masters who surveyed her, and gave their opinion. As no survey is produced, and neither of these ship-masters is a witness, the court can take no notice of any opinion they may have entertained or have given to the master of the Æolus. The testimony of the supercargo on this subject, if it made out an adequate cause for coming in, would have been entitled to more credit, if he had behaved throughout this transaction, in a manner more consistent than he appears to have done. But independent of his conduct, there are parts of his testimony which is very difficult to believe, and which throw a shade over the whole. He swears, that his instructions from Morgan were not in writing, and that he had never received either from him or Scholtz, any letter concerning this voyage. It is incredible, that any man should be intrusted with so large a property, without other than verbal instructions; or, at any rate, it is so entirely out of the common course of business, that the court cannot be blamed for disbelieving it. But there are other circumstances which detract much from the credit of these two witnesses. There is every reason to believe, from other evidence in the cause, that when the brig came into Bass Harbor, neither of them thought of justifying their conduct on *407] the ground of necessity. *This suggestion was made to them by Mr. Wood, and not until they had been there a week or longer. This fact is proved in a way to admit of but little doubt of its accuracy; not only by the profound silence which was observed on this subject by the master and others, for some time after the arrival of the brig, but by positive testimony, which establishes that the allegation of distress was a matter of concert between the supercargo and Mr. Wood. It also appears, by other witnesses in the cause, that the Æolus, notwithstanding the injuries which she had received, might have proceeded to the West Indies, without any other repairs than such as might have been put on her at sea. Upon the whole, the court is of opinion, that the coming in of the Æolus was voluntary, and not produced by any distress which could justify the measure, and that, thereupon, the sentence of the circuit court must be affirmed, with costs.

JOHNSON, Justice. (*Dissenting.*)—This valuable vessel, with a cargo worth

$120,000, is claimed as Russian property. She was libelled as forfeited under the provisions of the non-importation act, and all questions respecting proprietary interest I consider irrelevant to the case. The excuse for putting into the port of Bass Harbor was distress, and as in the case of *The New York* (*ante*, p. 59), the minority of the court are of the opinion, that she ought to have been permitted to store her cargo, repair, re-ship it and depart. Such evidently was the policy of the law under which she was seized, which had for its object the *exclusion of British goods; whereas, this seizure [*408 legalized their introduction into the country.

It is urged in this case, that a variety of circumstances indicated a fraudulent intention. That the examination of the witnesses exhibits a melancholy view of depravity of morals, I freely admit; but the observation is fully as applicable to the testimony for the prosecution, as that against it.

The two principal circumstances relied on as *indicia* of fraud, to wit, her clearing out for Havana, and her having a cargo adapted to a northern market, admit of an explanation perfectly consistent with innocence: for it is well known, that a neutral never clears out from a British port, to a port of their enemy; and as to her having a cargo adapted to a northern market, it is precisely what she avows, that her intention was to deposit it in that market, had the prohibition been taken off, on her arrival. Under these circumstances, it appears to me, that the only question in the case was, whether the distress was accidental or factitious. If there had been any fraudulent means made use of, to produce the injury sustained, condemnation ought to follow. But if produced by causes not within the control of man, even though the distress may not have been deemed sufficient to entitle the party to a permit to unlade and refit, yet it was no sufficient cause for condemnation, and the vessel should have been ordered off.

That the distress in this case was not factitious, nor very inconsiderable, there is every reason to believe. The vessel had had a voyage of seventy-five days, nearly double what might reasonably have been provided *for, she had shipped a sea which carried away her railings, and washed overboard one of her passengers; her shrouds and bowsprit [*409 were materially damaged, and her water short. Under these circumstances, I must think, that this collector was less under the influence of humanity and a sense of duty, than that of avarice, in making this seizure. Had he libelled her as enemy's property, I should have thought the case not destitute of reasonable grounds; but it was not his interest to convert her into a *droit* of admiralty, and it is not our province, under this libel, to admit anything into the case which can bear the appearance of charging with one crime, and trying for another.

Decree affirmed.

The ATALANTA: FOUSSAT, Claimant.

Prize.—Neutral cargo.

A neutral cargo, found on board an armed enemy's vessel, is not liable to condemnation as prize of war.

A question of proprietary interest: Further proof ordered.

APPEAL from the Circuit Court for the district of Georgia. This ship, being a British armed vessel, was captured, in the year 1814, on a voyage *410] from Bordeaux *to Pensacola, by the sloop of war Wasp, and sent into Savannah, in Georgia, where she was libelled, and condemned in the district court as prize of war.

The cargo, which was claimed for M. Foussat, a merchant domiciled at Bordeaux, was also condemned. On appeal to the circuit court as to the cargo, further proof was ordered, and restitution decreed to the claimant. The cause was then brought by appeal to this court.

The vessel was owned by Messrs. Barclay, Salkeld and Co., of Liverpool, who were also the owners of large cotton plantations near Pensacola. She sailed from Liverpool, on the 14th of August 1814, for Bordeaux, laden with a cargo, part of which, about equal in value to the cargo subsequently taken in at Bordeaux, belonged to the owners of the ship; and the documentary evidence showed, that her ultimate destination was Pensacola or the Havana. A few days after the arrival of the vessel at Bordeaux, she was chartered by the claimant, who then had a vessel of his own lying unemployed in that port, and the cargo claimed was put on board in September 1814. One Pritchard, who sailed in the vessel, was a British subject, and according to some of the testimony, acted as supercargo. At the time of the capture, the master and Pritchard were taken out of the vessel and carried on board the Wasp, which ship had never since been heard of, and was supposed to have been lost at sea.

The proceedings in the district court were extremely irregular; no examinations of the prisoners on the standing interrogatories having been *411] taken, and witnesses having been examined, in the first instance, *who neither belonged to the captured nor the capturing vessel. The further proof produced by the claimant in the court below consisted of an affidavit of the claimant, swearing to the property in himself, and a certificate of two royal notaries at Bordeaux, that the copy of a letter from the claimant to Vincent Ramez, the consignee at Pensacola, dated the 28th of August 1814, and stating the object of the adventure, was truly extracted from the claimant's letter-book.

Berrien, for the appellants and captors, argued, that the cargo was liable to condemnation, 1st. As being laden on board an enemy's armed vessel: and 2d, on account of the defects in the proofs of proprietary interest. That, although the doctrine inculcated in the case of *The Nereide*, 9 Cranch 388, tended to show that the circumstance of the cargo being found on board an armed enemy's vessel was not, in itself, a substantive cause of condemnation, the principle had not been decided by a majority of the court; Mr. Justice Johnson's opinion limiting it to the case of a neutral, at peace with all the world. Ibid. 431. This was not the case of Mr. Pinto, but it was the case of M. Foussat. Just before the decision of *The Nereide*, Sir WILLIAM SCOTT

had held the contrary doctrine (*The Fanny*, 1 Dods. 443, July 20th, 1814), and decreed salvage for the re-capture of neutral goods previously taken by one of our cruisers, on board an armed British ship, upon the ground, that *the American courts might justly have condemned the property. But even supposing this circumstance not to be a substantive cause of condemation, it inflames the suspicions of hostile interests, arising from the other circumstances of the case, and does not admit of an explanation consistently with the pretended neutral character set up by the claimant. The inconvenience of exposing himself to these suspicions must have been compensated by the protection afforded by an armed force, or that protection would not have been resorted to. The case is, in that respect, distinguished, to its disadvantage, from that whole class of cases, including *The St. Nicholas*, 1 Wheat. 417, and others, where fraud, and not force, was resorted to, in order to evade, instead of directly resisting, belligerent rights. The principle of reciprocity, as a doctrine of prize law, has been overruled by the court (*The Nereide*, 9 Cranch 422), and therefore, it cannot be contended, that the rule of the French prize code, by which the having an enemy's supercargo on board, is a cause of condemnation, is to be retaliated upon the claimant. But this fact increases the improbability, that a Frenchman, who must have known the law of his own country in this respect, would have exposed his property to the risk of confiscation, in the courts of a country, whose prize law he could not know, because it was still unsettled. All the other circumstances of the case tend to the conclusion, that it was not his property, but that of the British ship-owner. [*412

Sergeant, contrà, contended, that the case of *The Fanny*, even if it were not contradicted by that of *The Nereide*, was not directly in point. Sir W. Scott there goes on the ground of the probability or danger of condemnation in our courts, as affording a reason for giving salvage. Besides, *The Fanny* was a commissioned, as well as armed vessel; which *The Nereide* and *The Atalanta* were not. But it must be confessed, that the decision in *The Fanny* was a very careless, not to say superficial, judgment. The judge agrees, that the Portuguese flag was an inadequate protection, and yet holds the neutral liable to condemnation, for taking shelter under a belligerent force. With all due respect to the great man by whom it was pronounced, it may be said to be tinctured with some of those peculiarities which mark the conduct of the tribunals of a great maritime country, bent on the assertion of its pretensions, by its overwhelming naval power. At all events, it does not form a law for this court, any more than the principle of retaliation which has been already repudiated by the court. The proceedings in the present case have been marked by irregularities subversive of that justice which is due to neutrals, and by a neglect of those forms which are a part of the silent compact by which they agree to submit to the exercise of the harsh and inconvenient prerogative of search. The cause was not heard in the court of first instance, upon the ship's papers and the preparatory depositions, before extraneous testimony was let in, by an order for further proof. The salutary principles of prize practice, which afford a security to *neutrals, in a trial in the courts of the captor, that would otherwise be grossly oppressive, have been wholly disregarded. It is a rule of justice, in admiralty courts, whether of instance or prize, that where [*413 [*414

the original evidence appears to be clear, the court will not indulge in extraneous suspicions. *The Octavia*, 1 Wheat. 23 n. If the employment of an armed enemy's vessel be innocent, no unfavorable inference can legally be drawn from it, any more than from the employment of an unarmed belligerent carrier. Both this circumstance and the employment of an English supercargo (if he was employed) would rather show that no fraud was intended, since the annals of the prize court do not afford a single instance of a fraudulent case, which was not, entirely covered with the neutral garb.

The *Attorney General*, in reply, insisted, that the fact of the cargo being captured on board an armed belligerent ship, raised a strong presumption, throwing the *onus probandi* on the claimant, with more than usual weight. The only evidence to relieve this presumption, was the oath of the claimant himself, unsupported by that of any other witness, or by any documentary evidence; and that too, under an order for further proof; a mere test-affidavit, without which a claimant can in no case receive restitution, but which is no evidence, or next to none, in a case of the least doubt or difficulty.

*415] *MARSHALL, Ch. J., delivered the opinion of the court.—This vessel was captured on a voyage from Bordeaux to Pensacola, by the sloop of war Wasp, and sent into Savannah, in Georgia, where she was libelled and condemned as prize of war. The cargo was claimed for Mons. Foussat, a French merchant, residing at Bordeaux. In the district court, the cargo was condemned as enemy's property, avowedly on the principle that this character was imparted to it by the vessel in which it was found. On an appeal to the circuit court, further proof was directed, and this sentence was reversed, and restitution decreed to the claimant. From this decree, the captors appealed to this court.

It has been contended, that this cargo ought to be condemned as enemy's property, because, 1st. It was found on board an armed belligerent. 2d. It is, in truth, the property of British subjects.

On the first question, the case does not essentially differ from that of *The Nereide*. It is unnecessary to repeat the reasoning on which that case was decided. The opinion then given by three judges is retained by them. The principle of the law of nations, that the goods of a friend are safe in the bottom of an enemy, may be, and probably will be, changed, or so impaired as to leave no object to which it is applicable; but so long as the principle shall be acknowledged, this court must reject constructions which render it totally inoperative.

2d. Respecting the proprietary interest, much doubt is entertained. In addition to the extraordinary fact of employing a belligerent carrier, while *416] a neutral *vessel belonging to the alleged owner of the cargo lay in port, there are circumstances in this case, calculated to awaken suspicion, which the claimant ought to clear up, so far as may be in his power.

The return-cargo of the Atalanta was to be in cotton, and Berkely, Salkeld & Co., the owners of the vessel, were also owners of large cotton plantations, the produce of which might readily be shipped from Pensacola. The papers show that the Atalanta sailed from Liverpool, where her owners reside, with a cargo for Bordeaux, a part of which, about equal in value to

the cargo taken in at Bordeaux, belonged to Berkley, Salkeld & Co., and that her ultimate destination, at the time of sailing, was Pensacola, or the Havana. Within a day or two after her arrival at Bordeaux, she was chartered by the claimant, for the voyage on which she was captured, and the cargo he now claims was put on board. A Mr. Pritchard sailed in the vessel, who was a British subject, and who has been represented in some of the testimony as a supercargo.

There are, undoubtedly, circumstances to diminish the suspicion which must be excited by those that have been mentioned. The proceedings have been very irregular; no examinations *in præparatorio* have been taken. The master, and probably the mate, with the alleged supercargo, were carried on board the Wasp, and have perished at sea, and M. Foussat, whose character is unexceptionable, has sworn positively to his interest. Yet, this interest can be, and therefore, ought to be, proved by other testimony, and it is in the power of M. Foussat to explain circumstances, which, as they now appear, cannot be disregarded. The court, therefore, requires further proof, which M. Foussat is allowed to produce, to the following points: 1st. To his proprietary interest in the cargo; to show how and when it was purchased. 2d. To produce his correspondence with Barclay, Salkeld & Co., if any, respecting this voyage. 3d. To explain the circumstances relative to the original destination to Pensacola, when the Atalanta sailed from Liverpool. 4th. To explain the character of Mr. Pritchard, and his situation on board the Atalanta. 5th. To establish the genuineness of the letter of the 28th of August, and say by what vessel it was sent. 6th. To show to whom that part of the cargo of the Atalanta, on the voyage from Liverpool to Bordeaux, which belonged to Barclay, Salkeld & Co., was consigned, and how it was disposed of. 7th. To produce copies of the letters of Barclay, Salkeld & Co., relative to this transaction, or account for their non-production. [*417

JOHNSON, Justice.—When this cause was considered in the court below, I entertained great doubts on the subject of the proprietary interest. But those doubts have here been satisfactorily cleared up. I am now satisfied, that no inference unfavorable to the claim can fairly be drawn from the circumstance of this cargo being laden on board an armed belligerent. If it had been intended to throw a veil of neutrality over hostile property, it is more probable, that a neutral carrier would have been used than a belligerent; and as to the dangers supposed to have been unnecessarily incurred, of being captured and turned away from the destined market, it is more than probable, that a chance of being captured and carried into an American port, so far from being prejudicial to the adventure, would have enhanced its profits. The claimant, then, if conscious of his innocence, had no evil to apprehend from capture; on the contrary, as the cargo was calculated for an American market, it might, in case of capture, have reached its destination directly; whereas, if it had arrived at Pensacola, its route would have been more circuitous. With regard to the fact, that the voyage, in its inception, was destined to Pensacola, that I think also satisfactorily explained. It was in strict pursuance of her original destination; on her arrival at Bordeaux, she was put up for Pensacola, and chartered by this claimant for the voyage. The instructions to the master show that it was not fixed, [*418

whether, on her return-voyage, she should be laden on owners' account or not; and it probably depended upon the contingency of her being taken up at Bordeaux for a return freight. As to the facts that Pritchard, the supercargo to Bordeaux, continued in that capacity on the voyage to Pensacola; that Ramez, the consignee, was the agent of the ship-owner; and that the present cargo was purchased with the freight and cargo to Bordeaux, I am *419] now satisfied, that they are unsupported by the *evidence. That Pritchard should continue to be designated by the appellation of supercargo, among the crew, was to be expected, from his having been known among them, by that epithet, on the voyage to Bordeaux, and that Ramez, who had been recommended to Salkeld, Barclay & Co., for his integrity, by their agent, should be, by them, or by some other, recommended to the patronage of Foussat, was perfectly consistent with ordinary mercantile intercourse; and in the total absence of proof, that the freight, or proceeds of the outward carge of the ship, ever came to the hands of Foussat, there is no sufficient reason for conjecturing that the cargo laden on board for Pensacola was purchased with those funds.

I am, therefore, of opinion, that the proprietary interest is sufficiently established. But as the proprietary interest is altogether immaterial, if lading a neutral cargo on board an armed belligerent is, *per se*, a ground of condemnation, it becomes necessary to consider that question.

It has long been with me a rule of judicial proceeding, never, where I am free to act, to decide more in any case than what the case itself necessarily requires; and so far only, in my view, can a case be considered as authority. Accordingly, when the case of *The Nereide* was before this court, I declined expressing my opinion upon the general question, because the cargo, considered as Spanish property, was exposed to capture by the Carthagenian and other privateers, and, considered as belonging to a revolted colony, was liable to Spanish capture. The neutral shipper, therefore, could not be *420] charged with *evading our belligerent rights, or putting off his neutral character, when placing himself under the protection of an armed belligerent, when sailing, as that shipper was, between Scylla and Charybdis, he might accept of the aid or protection of one belligerent, without giving just cause of offence to another.

But a case now occurs, of a vessel at peace with all the world; and to give an order for further proof, without admitting the rule, that lading a neutral cargo on board an armed belligerent is not, *per se*, a cause of forfeiture, appears to me nugatory. It is true, this is not a case of a commissioned or cruising vessel, and I have no objection to reserving the question on such a case, until it shall occur, if it can be done consistently with the principles upon which I found my opinion; but in my view, there is no medium, and no necessity for a belligerent to insist on any exception in his favor. On the contrary, I consider all the evils as visionary, that are dwelt upon as the result of thus extending the right in favor of neutrals. No nation can be powerful on the ocean, that does not possess an extensive commerce; and if her armed ships are to be converted into carriers (almost, I would say, an absurd supposition), her own commerce would have the preference; so that the injury could never be of any real extent. But should it be otherwise; what state of things ought one belligerent more devoutly to desire, than that that the whole military marine of her enemy should be so employed,

and bound down to designated voyages, from which they were not at liberty to deviate? It would be curious, to see a government thus involving *itself with merchant shippers, in questions of affreighment, assurance, deviation, average and so forth; the possibility may be imagined, but [*421 the reality will never exist.

The general rule in this case, it will be observed, is controverted by no one; nor is it denied, that it is incumbent on the captor to maintain the exception contended for. It is for him to prove, that the acknowledged right of the neutral to employ a belligerent carrier, does not include the right of employing an armed belligerent carrier. In order to support this proposition, arguments are usually adduced, from the silence of writers upon the subject; from decisions in analogous cases; and from its general inconsistency with the belligerent right of search or adjudication. If it be asked, why have writers, and particularly the champions of neutral rights, been silent on this subject? I think, the answer obvious. Practically, it is of very little general importance, either to neutrals or belligerents, and those who are more disposed to favor belligerent claims would naturally avoid a doctrine which they could not maintain, whilst all who wrote for the benefit of those who are to read, would avoid swelling their volumes with unnecessary discussions, or raising phantoms for the amusement of laying them. The silence of the world upon the subject is, to my mind, a sufficient evidence that public sentiment is against it. It is impossible, but that in the course of the long and active naval wars of the last two centuries, cases must have occurred in which it became necessary to consider this *question; and [*422 though it had escaped the notice of jurists, it must have been elicited by the avarice of captors, the ingenuity of proctors, or the learned researches of courts of prize. Yet, we find not one case on record, of a condemnation, as prize of war, on the ground of armament, nor a *dictum* in any of the books, that suggests such an exception. But the rule itself is laid down everywhere; and in my view, laying down the rule, without the exception is, in effect, a negative to the exception.

But it is not true, that this subject had altogether escaped the notice of writers on the law of prize. There is on record one opinion on this subject, and that of great antiquity and respectability, and which may have given the tone to public opinion, and thus account for the silence of subsequent writers: I allude to the *dictum* extracted from Casaregis, in which the author asserts "that if a vessel, laden with neutral merchandise, attack another vessel, and be captured, her cargo shall not be made prize, unless the owner of the goods, or his supercargo, engage in the conflict." Now, if an actual attack shall not subject to forfeiture, much less shall arming for defence; and it is fairly inferrible from the passage, that the author had in his view, the case of an armed belligerent carrier, or he would not have represented her as the attacking vessel.

But it is contended, that decisions have taken place, in the courts of other states, in analogous cases, which cannot be reconciled with the principle on which the claimant rests his defence. On this subject, I will make one general remark: I acknowledge *no decision as authority in this court, [*423 but the decisions of the court, so far as necessary to the case decided; and the decisions of the state courts, so far as they go to fix the land-marks

of property; and generally, the *lex loci* of the respective states. All other decisions I will respect for as much as they are worth in principle.

The decisions relied on in this part of the argument are those by which neutral vessels, under neutral convoy, were condemned, for the unneutral act of the convoying vessel; and those in which neutral vessels have been condemned, for placing themselves under protection of a hostile convoy. With regard to the first class of cases, it is very well known, that they originated in the capture of the Swedish convoy, at a time when Great Britain had resolved to throw down the glove to all the world, on the principle of the northern confederacy. It was, therefore, a measure essentially hostile. But independently of this, there are several considerations which present an obvious distinction between both classes of cases and this under consideration. A convoy is an association for a hostile object; in undertaking it, a nation spreads over the merchant vessel an immunity from search, which belongs only to a national ship; and by joining a convoy, every individual ship puts off her pacific character, and undertakes for the discharge of duties which belong only to the military marine, and adds to the numerical, if not to the real, strength of the convoy. If, then, the association be voluntary, the neutral, in suffering the fate of the whole, has only to regret his own folly, in wedding *his fortune to theirs; or, if *424] involved in the aggression or opposition of the convoying vessel, he shares the fate which the leader of his own choice either was, or would have been, made liable to, in case of capture. To elucidate this idea, let us suppose the case of an individual, who voluntarily fills up the ranks of an enemy, or of one who only enters upon the discharge of those duties in war, which would otherwise take men from the ranks; and the reason will be obvious, why he should be treated as a prisoner of war, and involved in the fate of a conquered enemy. But it is not so with the goods which constitute the lading of a ship; those give neither real nor numerical strength to an enemy, but rather embarrass and impede him. And even if it be admitted, that in all cases, a cargo should be tainted with the offence of the carrying vessel, it will be seen, that the reason upon which those cases profess to proceed, is not applicable to the case of neutral goods on board a hostile carrier. Resistance, either real or constructive, by a neutral carrier, is, with a view to the law of nations, unlawful; but not so, with the hostile carrier; she had a right to resist, and in her case, therefore, there is no offence committed, to communicate a taint to her cargo.

But it is contended, that the right to use a hostile armed carrier is inconsistent with the belligerent's right of search, or of capture, or of adjudication; for on this point the argument is not very distinct, though I plainly perceive it must be the right of adjudication, if any, that is impaired. The right of capture applies only to enemy ships or goods; the right of search to *enemy goods, on board a neutral carrier; and therefore, it must *425] be the right of adjudication that is supposed to be impaired, which applies to the case of goods found either on board of a neutral or belligerent, and this mere *scintilla juris* is, at last, the real basis upon which the exception contended for must rest. But in what manner is this right of adjudication impaired? The neutral does not deny the right of the belligerent to decide the question of proprietary interest. If it be really neutral, of what consequence is it to the belligerent, who is the carrier? He has

no right to capture it; and if it be hostile, covered as neutral, the belligerent is only compelled to do that which he must do in all ordinary cases—subdue the ship, before he gets the cargo. It cannot be expected, that the belligerent will rest his complaint upon the humiliating ground of his inability to subdue his enemy; and if he should, the neutral may well reply, it is his affair or his misfortune, but ought not in any of its consequences to affect the rights of the neutral. Nor is it at all certain, that lading on board an enemy carrier is done, at all times, with an intent to avoid capture; it may be to solicit it; as in the case of the late war, when British goods, though neutral owned, could only be brought into our market through the medium of capture. There, instead of capture being a risk of the voyage, it was one of the chances of profit. And the hostile carrier may have been preferred to the neutral, with the express view of increasing the chances of capture.

When we come to analyze and apply the arguments of *the defenders of this exception, I think it will be found, that they expose [*426 themselves to the imputation of unfairness, in professing to sustain an exception, when they mean to aim a blow at the whole neutral right of using a belligerent carrier; or they do not follow up their reasoning in its consequences, so as to be sensible of the result to which it leads. The exception which exhausts the principal rule, must be incorrect, if the rule itself be admitted as a correct one; it is, in fact, an adverse proposition, and it appears to demonstrate that all the arguments urged in favor of the exception now under consideration, if they prove anything, prove too much, and obviously extend to the utter extinction of the rule itself, or the destruction of every beneficial consequence that the neutral can derive from it. Thus, if it be unlawful to employ an armed belligerent carrier, then what proportion of armament or equipment will render it unlawful? Between one gun and one hundred, the difference is only in degree, not in principle; and if it is left to the courts of the belligerent to apply the exception to successive cases as they arise, it evidently becomes a destroying principle, which will soon consume the vitals of the rule. And the neutral will soon consider it as a snare, not a privilege.

Again, the proposition is, that the neutral may employ a hostile carrier; but the indispensable attributes of a state of hostility are the right of armament, of defence, of attack and of capture; if, then, you strip the belligerent of any one or more of these characteristics, the proposition is falsified, for he can no longer *be called a hostile carrier; he assumes an amphibious [*427 anomalous character, for which there is no epithet applicable, unless it be that of semi-hostile. And what becomes of the interest of the neutral? It is mockery, to hold out to him the right of employing a hostile carrier, when you attach to the exercise of that right, consequences, which would make it absurd for a belligerent to enter into a charter-party with him. If resistance, arming, convoying, capturing, be the acknowledged attributes and characteristics of the belligerent, then deprive him of these attributes, and you reduce him to a state of neutrality, nay, worse than a state of neutrality; for he continues liable to all the danger incident to the hostile character, without any of the rights which that character confers upon him. What belligerent could ever be induced to engage in the transportation of neutral goods, if the consequences of such an undertaking be, that he puts

off his own character, and assumes that of the neutral, relinquishes his right of arming or resisting, without acquiring the immunities or protection of the neutral character. It is holding out but a shadow of a benefit to the neutral.

Some confusion is thrown over this subject, by not discriminating carefully between the cases where a neutral shipper, and a hostile carrier, are the parties to the contract, and those in which both shipper and carrier are hostile. In the latter case, the carrier, when armed, may fairly be understood to have undertaken to fight, as well as to carry. But when a neutral is the shipper, the carrier (independently of specific contract), is left to
*428] fight, or not, as he shall deem proper. *Thus, if a neutral shipper charter an unarmed belligerent, he would not be released from his contract, should the belligerent put arms or men into his ship; otherwise, taking ordinary and prudent precaution for the safety of his vessel, precautions which would, in general, lessen the insurance on the cargo itself, would be a violation of the master's contract. And on the other hand, a belligerent master would be under no obligation to the neutral to fight, if met by an enemy on the ocean, even though particularly required by the neutral shipper. There is, then, nothing in that argument which is founded on the supposition that the neutral is assisting in expediting a naval hostile equipment, when he employs a belligerent carrier; on the contrary, he either embarrasses the belligerent in, or detaches him from, the operations of war.

It makes no difference, in my view, whether the right of using a hostile carrier, be considered as a voluntary concession in behalf of neutrals, or as a conclusion from those principles which form the basis of international law. We find it emanating from the same source as the right of search and adjudication, and it is of equal authority. If, in practice, it should ever be found materially detrimental to acknowledged national rights, it may be disavowed or relinquished; or should our own legislative power ever think proper to declare against the right, it can impose the law upon its own courts. But until it shall be so relinquished or abrogated, we are bound to apply it, with all the beneficial consequences that it was intended to produce.

*429] I do not, however, consider it as a mere voluntary *concession in favor of neutral commerce. Were it now, for the first time, made a question whether a neutral should be permitted to use a hostile carrier, I should not hesitate to decide, that it would be exceedingly harsh and unreasonable, to deny to the neutral the exercise of such a right. The laws of war and of power, already possess sufficient advantages over the claims of the weak, the wise and pacific. I am, in sentiment, opposed to the extension of belligerent rights. Naval warfare, as sanctioned by the practice of the world, I consider as the disgrace of modern civilization. Why should private plunder degrade the privileges of a naval commission? It is ridiculous, at this day, to dignify the practice with the epithet of reprisal. It it be reprisal, we may claim all the benefit of the example of the savages in our forests, to whom the practice is familiarly known, but we must yield to them in the reasonableness of its application, for they really do apply the thing taken, to indemnify the party injured. The time was, when war, by land and by sea, was carried on upon the same principles. The good sense of mankind has lessened its horrors on land, und it is scarcely possible to find any sufficient reason why an analogous reformation should not take place upon the

ocean. The present time is the most favorable that has ever occurred for effecting this desirable change. There is a power organized upon the continent of Europe that may command the gratitude and veneration of posterity, by determining on this reformation. It must take effect, when they resolve to enforce it.

*We find the law of nations unfortunately embarrassed with the principle, that it is lawful to impose a direct restraint upon the [*430 industry and enterprise of a neutral, in order to produce an incidental embarrassment to an enemy. In its original restricted application, this principle was of undoubted correctness, and did little injury; but in the modern extended use which has been made of it, we see an exemplification of the difficulty of restraining a belligerent in the application of a convenient principle, and an apposite illustration of one of the objections to admitting the exception, unfavorable to the use of an armed hostile carrier. But surely, there must be some limit to the exercise of this right by a belligerent. And it is incumbent upon him to show, that the restraint imposed upon the neutral is indispensable to the exercise of his own acknowledged right, or the punishment inflicted on him, to be justly due to the violation of his neutral obligations. Now, what violation of belligerent right, or neutral obligation, can result from the employment of a hostile carrier? If employed to break a blockade, carry goods that are contraband of war, or engaged in other illicit trade, the goods are liable to condemnation, on principles having no relation to this case. But if employed in lawful commerce, where is the injury done to the belligerent? There is no partiality exhibited on the part of the neutral; for the belligerents are necessarily excluded from each others' ports, and cannot be employed, except each in the commerce of his own country; and so far from violating any belligerent right, the neutral *tempts the ship of the enemy from a place of safety, to [*431 expose her to hostile capture, or detaches her from warlike operations, and engages her in pursuits less detrimental to the interest of her enemy, than cruising or fighting. To the neutral, the right of employing a hostile carrier may be of vital importance. The port of the enemy may be his granary; he may have no ships of his own, no other carrier may be found there; no other permitted to be thus employed, or no other serve him as faithfully, or on as good terms. So also, with regard to the produce of his own industry, his only market may be in the port of one of the belligerents, and his only means of access to it, through the use of the carriers of that port.

A case has been referred to in the argument: the case of *The Fanny*, in Dodson's reports; in which the court of admiralty, in England, granted salvage upon goods shipped on board an armed enemy carrier, captured by an American privateer, and re-captured by the British. The ground on which the court professes to proceed, according to the report, is, that these goods were in danger of being condemned in our courts, on the ground, that the shipper had quitted the protection of his neutrality, and resorted to the protection of arms. Had the question decided in that case been one of forfeiture, and not of salvage, that decision would have been in point. But even then, I should have claimed the privilege exercised by the learned judge who presides in that court with so much usefulness to his country, and honor to himself, of founding my own *opinions upon my own [*432

researches and resources. Should a similar case ever again occur in that court, and the decisions of this court have passed the Atlantic, that learned judge will be called on to acknowledge, that the danger of condemnation was not as great as he had imagined; and that, independent of the question agitated in this case, this court would have had respect to the embarrassing state of warfare in which the people of Buenos Ayres were involved, and adjudged, that the precautions for defence were intended against their enemies rather than their friends. With regard to the award of salvage, it is well known, that the grant of salvage upon the re-caption of a neutral was the favorite offspring of that judge's administration; until then, no contribution had been levied upon neutral commerce, to give activity to hostile enterprise. When a question of salvage on such a re-capture shall occur in this court, those adjudications will come under review; but this case cannot be considered in point, until this court is called on to decide, whether the British example shall prevail, or the obvious dictate of reason, that the neutral should be liberated and permitted to pursue his voyage, or, at least, to decide for himself, in which of the belligerent courts his rights will be most secure.

Upon the whole, I am fully satisfied that the decision in the case of *The Nereide*, was founded in the most correct principles, and recognise the rule, that lading on board an armed belligerent is not, *per se*, a cause of forfeiture; as not only the most correct *on principle, but the most liberal and honorable to the jurisprudence of this country.[1]

*433]

Further proof ordered.(a)

Houston *v.* Moore.

Error to state court.—Final judgment.

The court has no jurisdiction, under the 25th section of the judiciary act of 1789, unless the judgment or decree of the state court be a final judgment or decree. A judgment, reversing that of an inferior court, and awarding a *venire facias de novo*, is not a final judgment.[2]

Error to the Supreme Court of the state of Pennsylvania. This was an action of trespass, brought by the plaintiff in error, against the defendant in error, for levying a fine ordered to be collected by the sentence of a court-martial, under an act of the legislature of the state of Pennsylvania, which was alleged to be repugnant to the constitution and laws of the United States.

The suit was commenced in the court of common pleas for the county of Lancaster, in which court a trial was had, and the jury, under the charge of the court, found a verdict for the plaintiff, on which *judgment was rendered. The cause was carried to the supreme court of the state of Pennsylvania, by writ of error, where the judgment of the court of common pleas was reversed, and the cause remanded to that court, with directions to award a *venire facias de novo*. The plaintiff then sued out a writ of error, to bring the cause to this court.

*434]

(a) Mr. Justice Todd and Mr. Justice Duvall did not sit in this cause.

[1] The property was finally condemned, the further proof not being deemed satisfactory by the court. See 5 Wheat. 433.

[2] S. P. Reddall v. Bryan, 24 How. 420.

The Anne

C. J. Ingersoll moved to dismiss the writ of error, as having been improvidently issued, under the 25th section of the judiciary act, the decision of state court not being a "final judgment," in the cause.

Hopkins, contrà.

MARSHALL, Ch. J., delivered the opinion of the court.—The appellate jurisdiction of this court, under the 25th section of the judiciary act, ch. 20, extends only to a final judgment or decree of the highest courts of law or equity in the cases specified. This is not a final judgment of the supreme court of Pennsylvania. The cause may yet be finally determined in favor of the plaintiff, in the state court.

Writ of error dismissed.

JUDGMENT.—This cause came on to be heard, on the transcript of the record of the supreme court of the commonwealth of Pennsylvania for the Lancaster district. On examination whereof, it is adjudged and ordered that the writ of error in this cause be, and the same is hereby dismissed, this court not having *jurisdiction in said cause, there not having [*435 been a final judgment in said suit, in the said supreme court of the commonwealth of Pennsylvania.(a)

The ANNE: BARNABEU, Claimant.

Captors as witnesses.—Claim by neutral consul.—Capture within neutral territories.

The captors are competent witnesses, upon an order for further proof, where the benefit of it is extended to both parties.

The captors are always competent witnesses, as to the circumstances of the capture, whether it be joint, collusive, or within neutral territory.

It is not competent for a neutral consul, without the special authority of his government, to interpose a claim, on account of the violation of the territorial jurisdiction of his country.[1]

Quære? Whether such a claim can be interposed, even by a public minister, without the sanction of the government in whose tribunals the cause is pending?

A capture, made within neutral territory, is, as between the belligerents, rightful; and its validity can only be questioned by the neutral state.[2]

If the captured vessel commence hostilities upon the captor, she forfeits the neutral protection, and the capture is not an injury for which redress can be sought from the neutral sovereign.

Irregularities on the part of the captors, originating from mere mistake or negligence, which work no irreparable mischief, and are consistent with good faith, will not forfeit their rights of prize.[3]

APPEAL to the Circuit Court for the district of Maryland. *The [*436 British ship Anne, with a cargo belonging to a British subject, was captured by the privateer Ultor, while lying at anchor, near the Spanish part of the island of St. Domingo, on the 13th of March 1815, and carried into New York for adjudication. The master and supercargo were put on

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(a) Costs are not given, where the writ of error is dismissed for want of jurisdiction. Inglee v. Coolidge, 2 Wheat. 368.

[1] See The Bello Corrunes, 6 Wheat. 152; The London Packet, 1 Mason 14; The Adolph, 1 Curt. 87; The Huntress, 2 Wall. Jr. C. C. 59.

[2] The Sir William Peel, 5 Wall. 517.

[3] The Arabella, 2 Gallis. 368.

shore at St. Domingo, and all the rest of the crew, except the mate, carpenter and cook, were put on board the capturing ship. After arrival at New York, the deposition of the cook only was taken, before a commissioner of prize, and that, together with the ship's papers, was transmitted, by the commissioner, under seal, to the district judge of Maryland district, to which district the Anne was removed, by virtue of the provisions of the act of congress of the 27th of January 1813, ch. 478.

Prize proceedings were duly instituted against the ship and cargo, and a claim was afterwards interposed, in behalf of the Spanish consul, claiming restitution of the property, on account of an asserted violation of the neutral territory of Spain. The testimony of the carpenter was thereupon taken by the claimant, and the captors were also admitted to give testimony as to the circumstances of the capture; and upon the whole evidence, the district court rejected the claim, and pronounced a sentence of condemnation to the captors. Upon appeal to the circuit court, peace having taken place, the British owner, Mr. Richard Scott, interposed a claim for the property, and the decree of the district court was affirmed, *pro formâ*, to bring the cause for a final adjudication before this court.

*437] *March 5th. *Harper*, for the appellant and claimant, argued, that the captors were incompetent witnesses, on the ground of interest, except when further proof was imparted to them (*The Adriana*, 1 Rob. 34; *The Haabet*, 6 Ibid. 54; *L'Amitie*, Ibid. 269 n., and that they were not entitled to the benefit of further proof in this case, being *in delicto*. The irregularity of their proceedings, and the violation of the neutral territory, would not only exclude them from further proof, but forfeit their rights of prize. The testimony being irregular, it must appear, affirmatively, that it was taken by consent, where the irregularity consists, not in a mere omission of form, but in the incompetency or irrelevancy of the evidence. The testimony of the captors being excluded from the case, the violation of the neutral territory would appear uncontradicted. The text-writers affirm the immunity of the neutral territory from hostle operations in its ports, bays and harbors, and within the range of cannon-shot along its coasts. Vattel, lib. 3, ch. 7, § 132; Ibid. lib. 1, ch. 23, § 289; Bynk. Q. J. Pub. lib. 1, ch. 8; Martens, lib. 8, ch. 6, § 6; Azuni, pt. 2, ch. 5, art. 1, § 15. Nor can it be used as a station from which to exercise hostilities. *The Twee Gebroeders*, 3 Rob. 162; *The Anna*, 5 Ibid. 332.

As to the authority by which the claim was interposed, the Spanish consul's was sufficient for that purpose; especially, under the peculiar circumstances of the times, when, on account of the unsettled state of the government in Spain, no minister from that country was received by our govern-
*438] ment, *but the former consuls were continued in the exercise of their functions by its permission. In one of the cases in the English books, the Portuguese consul was allowed to claim on account of violated territory, although it does not appear that he had any special instructions from his sovereign for that purpose. *The Vrow Anna Catharina*, 5 Rob. 15. But even supposing the powers of a consul not adequate to this function, whence arises the necessity that the neutral government should interfere in general? Because the enemy proprietor is absolutely incapable of interposing a claim

on this, or any other ground. But here the incapacity of the claimant is removed, his *persona standi in judicio* being restored by the intervention of peace. He may, consequently, assert his claim upon every ground which shows that the capture, though of enemy's property, was originally unlawful and void.

D. B. Ogden and *Winder*, contrà, contended, that the captors were admissible witnesses in this case, as they are in all cases respecting the circumstances of the capture; such as collusive and joint captures, where the usual simplicity of the prize proceedings is necessarily departed from. So also, their testimony is generally admitted on further proof. *The Maria*, 1 Rob. 340. *The Resolution*, 6 Ibid. 13; *The Grotius*, 9 Cranch 368; *The Sally*, 1 Gallis. 401; *The George*, 1 Wheat. 408. A claim founded merely upon the allegation of a violation of neutral territory, is a case peculiarly requiring the *introduction of evidence from all quarters, the captors being as much necessary witnesses of the transaction as are the captured persons. [*439 Every capture of enemy's property, wheresoever made, is valid, *primâ facie;* and it rests with the neutral government to interfere, where the capture is made within neutral jurisdiction. The enemy proprietor has no *persona standi in judicio* for this or any other purpose. But here, the suggestion of a violation of the neutral territory is not made by proper authority. All the cases show that a claim for this purpose can only be interposed by authority of the government whose territorial rights have been violated. *The Twee Gebroeders*, 3 Rob. 162, n.; *The Diligentia*, 1 Dods. 412; *The Eliza Ann*, Ibid. 244. The public ministers of that government may make the claim, because they are presumed to be fully empowered for that purpose: but a consul is a mere commercial agent, and has none of the diplomatic attributes or privileges of an ambassador; he must, therefore, be specially empowered to interpose the claim, in order that the court may be satisfied that it comes from the offended government. A consul may, indeed, claim for the property of his fellow-subjects, but not for the alleged violation of the rights of his sovereign; because it is for the sovereign alone to judge when those rights are violated, and how far policy may induce him silently to acquiesce in those acts of the belligerent by which they are supposed to be infringed. There is only one case in the English books where a claim of this sort appears to have been made *by a consul; and from the report of that case, it may be fairly inferred, that he was specially directed [*440 by his government to interpose the claim. *The Vrow Anna Catharina*, 5 Rob. 15. But even the Spanish government itself has not conducted with that impartiality between the belligerents, which entitles it to set up this exemption. *The Eliza Ann*, 1 Dods. 244, 245. Its territory was, during the late war, permitted to be made the theatre of British hostility, and in various instances, was violated with impunity. Spain was incapable, or unwilling, at that time, to maintain her neutrality, in any part of her immense dominions. In this very case, the captured vessel was not attacked; she was the aggressor: and in self-defence, the privateer had not only a right to resist, but to capture. The local circumstances alone would have prevented the Spanish government from protecting the inviolability of its territory, on a desert coast, and out of the reach of the guns of any fortress. Bynkers-

hoek (*a*) and Sir WILLIAM SCOTT hold, that a flying enemy *may lawfully be pursued and taken in such places, if the battle has been commenced on the high seas. *The Anna*, 5 Rob. 345. *A fortiori*, may an enemy, who commences the first attack within neutral jurisdiction, be resisted and captured.

But should all these grounds fail, the captors may stand upon the effect of the treaty of peace, in quieting all titles of possession arising out of the war. Wheat. on Capt. 307, and the authorities there cited. As between the American captors and the British claimant, the proprietary interest of
*442] the *latter was completely divested by the capture. The title of the captors acquired in war was confirmed by bringing the captured property *infra præsidia*. The neutral government has no right to interpose, in order to prevent the execution of the treaty of peace in this respect by compelling restitution to British subjects, contrary to the treaty to which they are parties. The neutral government may, perhaps, require some atonement for the violation of its territory, but it has no right to require that this atonement shall include any sacrifice to the British claimant.

Harper, in reply, insisted, that the claim of neutral territory, as invalidating the capture, might be set up by a consul as well as any other public minister. He may be presumed to have been authorized to interpose it by his government; and in the case of *The Vrow Anna Catharina*, 5 Rob. 15, it does not appear, that any proof was given to the court, that the Portuguese consul was specially instructed to make the suggestion. However partial and unjustifiable may have been the conduct of Spain, in the late war, it has not yet been considered by the executive government and the legislature (who are exclusively charged with the care of our foreign relations), as forfeiting her right, still to be considered, in courts of justice, as a neutral state. In the case of *The Eliza Ann*, 1 Dods. 241, Sir W. SCOTT

(*a*) Q. J. Pub. lib. 1, ch. 8. *Uno verbo: territorium communis amici valet ad prohibendum vim quæ ibi inchoatur, non valet ad inhibendam, quæ, extra territorium inchoata, dum fervet opus, in ipso territorio continuatur.*" This opinion of Bynkershoek, in which Casaregis seems to concur (Disc. 24, n. 11), is reprobated by several writers. De Habreu, part 1, ch. 4, § 15; Azuni, part 2, c. 4, art. 1; Valin, Traité des Prises, ch. 4, § 3, n. 4, art. 1; Emerigon, Des Assurances, tom. 1, p. 449. Azuni observes "Di fatti dacchè il nemico perseguitato si trova sotto il cannone, o nel mare territoriale della potenza amica e neutrale, egli si considera tosto sotto l'asilo, e protezione della nazione pacifica ed amica: laonde se fosse permesso di continuare il corso fino alle spiagge neutrali, potrebbe anche continuarsi nel porto medesimo ed incendiare perfino la città ove l'inseguita nave si fosse rifugiata. Lo stesso Casaregi connobe in appresso lo sbaglio preso su di questa materia o scordò questia sua dottrina, giacchè sostenne di poi l'opinione in altro discorso posteriormente scritto da lui." "Aut naves inimicæ (et hæc est secunda pars distinctionis principalis) reperiuntur intra portus, vel sub præsidiis, vel arcibus maritimis alicujus principis alieni, aut in mari ita vicino, ut tela tormentave muralia maritimae arcis illuc adigi possint, tunc citra omne dubium dictae naves hostiles, eoque minus naves communis amici principis recognosci, visitari, et depraedari sub quovis praetextu minime valent, quia dictae naves non minus sunt sub custodia et protectione talis principis, quam sunt illius subditi intra civitatis muros existentes." Optimus textus est in lege 3, § fin. ff.; *de adquir. rer. dom.* Ibid. "Quidquid autem eorum coeperimus, eo usque nostrum esse intelligitur, donec nostra custodia coercetur. Casaregis, Disc. 174, n. 11, Ibid."

went on the ground of the *legal existence of a war between Great Britain and Sweden, although declared by Sweden only; and that the place where the capture was made, was in the hostile possession of the British arms. The observations thrown out by him, in delivering his judgment, as to the necessity of the neutral state maintaining a perfect impartiality between the belligerents, in order to support a claim of this sort, in the prize court, were superfluous; because the facts showed that Sweden was in no respect to be considered as neutral, having openly declared war against Great Britain, and a counter-declaration being unnecessary to constitute a state of hostilities.

As to the alleged resistance of the captured vessel, it was a premature defence only, commenced in consequence of apprehensions from Carthagenian rovers, which frequented those seas; and being the result of misapprehension, could confer no right to capture, where none previously existed. Being in a neutral place, the vessel was entitled to the privileges of a neutral. Resistance to search does not always forfeit the privileges of neutrality; it may be excused, under circumstances of misapprehension, accident or mistake. *The St. Juan Baptista*, 5 Rob. 36. But resistance to search by a neutral on the high seas is generally unjustifiable. Here, the right of search could not exist, and consequently, an attempt to exercise it might lawfully be resisted. Finding the neutral territory no protection, the captured vessel resumed her rights as an enemy, and attempted to defend herself.

The titles of possession, which are said *to be confirmed by a treaty of peace, are those which arise from sentences of condemnation, [*444 valid or invalid; but the principle cannot be applied to a mere tortious possession, unconfirmed by any sentence of condemnation, like the present. The capture being invalid *ab initio*, and the former proprietor being rehabilitated in his rights, by the intervention of peace, may interpose his claim, at any time before a final sentence of condemnation.

March 7th, 1818. STORY, Justice, delivered the opinion of the court.—The first question which is presented to the court is, whether the capture was made within the territorial limits of Spanish St. Domingo. The testimony of the carpenter and cook of the captured vessel distinctly asserts, that the ship, at the time of the capture, was lying at anchor, about a mile from the shore of the island. The testimony of the captors as distinctly asserts, that the ship then lay at a distance of from four to five miles from the shore.

It is contended by the counsel for the claimants, that captors are in no cases admissible witnesses in prize causes, being rendered incompetent by reason of their interest. It is certainly true, that, upon the original hearing, no other evidence is admissible than that of the ship's papers, and the preparatory examinations of the captured crew. But upon an order for further proof, where the benefit of it is allowed to the captors, their attestations are clearly admissible evidence. This is the ordinary course of prize courts, especially, where it becomes material to ascertain the circumstances of the capture; for in such cases, the *facts lie as much within the [*445 knowledge of the captors as the captured; and the objection of interest generally applies as strongly to the one party as to the other. It is a mistake, to suppose that the common-law doctrine, as to competency, is

applicable to prize proceedings. In courts of prize, no person is incompetent, merely on the ground of interest. His testimony is admissible, subject to all exceptions as to its credibility. The cases cited at the argument distinctly support this position; and they are perfectly consistent with the principles by which courts of prize profess to regulate their proceedings. We are, therefore, of opinion, that the attestations of the captors are legal evidence in the case, and it remains to examine their credit. And without entering into a minute examination, in this conflict of testimony, we are of opinion, that the weight of evidence is, decidedly, that the capture was made within the territorial limits of Spanish St. Domingo.

And this brings us to the second question in the cause; and that is, whether it was competent for the Spanish consul, merely by virtue of his office, and without the special authority of his government, to interpose a claim in this case for the assertion of the violated rights of his sovereign? We are of opinion, that his office confers on him no such legal competency. A consul, though a public agent, is supposed to be clothed with authority only for commercial purposes. He has an undoubted right to interpose claims for the restitution of property belonging to the subjects of his own country; but he is not considered as a minister, or diplomatic agent of his
*446] sovereign, *intrusted, by virtue of his office, with authority to represent him in his negotiations with foreign states, or to vindicate his prerogatives. There is no doubt, that his sovereign may specially entrust him with such authority; but in such case, his diplomatic character is superadded to his ordinary powers, and ought to be recognised by the government within whose dominions he assumes to exercise it. There is no suggestion or proof of any such delegation of special authority in this case; and therefore, we consider this claim as asserted by an incompetent person, and on that ground, it ought to be dismissed. It is admitted, that a claim by a public minister, or, in his absence, by a *chargè d'affaires*, in behalf of his sovereign, would be good. But in making this admission, it is not to be understood, that it can be made in a court of justice, without the assent or sanction of the government in whose courts the cause is depending. That is a question of great importance, upon which this court expressly reserve their opinion, until the point shall come directly in judgment.(*a*)

The claim of the Spanish government for the violation of its neutral territory being thus disposed of, it is next to be considered, whether the British claimant can assert any title founded upon that circumstance? By the return of peace, the claimant became rehabilitated with the capacity to sustain a suit in the courts of this country; and the argument is, that a capture
*447] made in a neutral territory is void; and *therefore, the title by capture being invalid, the British owner has a right to restitution. The difficulty of this argument rests in the incorrectness of the premises. A capture made within neutral waters is, as between enemies, deemed, to all intents and purposes, rightful; it is only by the neutral sovereign that its legal validity can be called in question; and as to him and him only, is it to be considered void. The enemy has no rights whatsoever; and if the netural

(*a*) See Viveash *v.* Becker, 3 Maule & Selwyn 284, as to the extent of the powers and privileges of consuls.

sovereign omits or declines to interpose a claim, the property is condemnable, *jure belli*, to the captors. This is the clear result of the authorities; and the doctrine rests on well established principles of public law.(*a*)

There is one other point in the case which, if all other difficulties were removed, would be decisive against the claimant. It is a fact, that the captured ship first commenced hostilities against the privateer. This is admitted on all sides; and it is no excuse, to assert that it was done under a mistake of the national character of the privateer, even if this were entirely made out in the evidence. While the ship was lying in neutral waters, she was bound to abstain from all hostilities, except in self-defence. The privateer had an equal title with herself to the neutral protection, and was in no default, and approaching the *coast, without showing her national character. It was a violation of that neutrality which the captured [*448 ship was bound to observe, to commence hostilities, for any purpose, in these waters; for no vessel coming thither was bound to submit to search, or to account to her for her conduct or character. When, therefore, she commenced hostilities, she forfeited the neutral protection, and the capture was no injury for which any redress could be rightfully sought from the neutral sovereign.

The conclusion from all these views of the case is, that the ship and cargo ought to be condemned as good prize of war. And the only remaining inquiry is, whether the captors have so conducted themselves as to have forfeited the rights given by their commission, so that the condemnation ought to be to the United States? There can be no doubt, that if captors are guilty of gross misconduct, or *laches*, in violation of their duty, courts of prize will visit upon them the penalty of a forfeiture of the rights of prize, especially, where the government chooses to interpose a claim to assert such forfeiture. Cases of gross irregularity, or fraud, may readily be imagined, in which it would become the duty of this court to enforce this principle in its utmost rigor. But it has never been supposed, that irregularities, which have arisen from mere mistake or negligence, when they work no irreparable mischief, and are consistent with good faith, have ordinarily induced such penal consequences. There were some irregularities in this case; but there is no evidence upon the record, from which we can infer, that there was any fraudulent *suppression, or any gross misconduct, inconsistent with good faith; and therefore, we are of opinion, that condemnation [*449 ought to be to the captors.

It is the unanimous opinion of the court, that the decree of the circuit court be affirmed, with costs.

Decree affirmed.

(*a*) The same rule is adhered to, in the prize practice of France, and was acted on in the case of the Sancta Trinita, a Russian vessel, captured within a mile and a half of the coast of Spain; but the council of prizes refused restitution, because the Spanish government did not interpose a claim on account of its violated territory. Bonnemant's Translation of De Habreu, tom. 1, p. 117.

Brown *v.* Jackson.

Deed.—Recording.

Although the grantees in a deed executed after, but recorded before, another conveyance of the same land, being *bonâ fide* purchasers, without notice, are by law deemed to possess the better title; yet, where L. conveyed to C. the land in controversy, specifically, describing himself as devisee of A. S., by whom the land was owned in his lifetime, and by a subsequent deed (which was first recorded), L. conveyed to B. "all the right, title and claim, which he, the said A. S., had, and all the right, title and interest which the said S. holds, as legatee and representative to the said A. S. deceased, of all land lying and being within the state of Kentucky, which cannot at this time be particularly described, whether by deed, patent, mortgage, survey, location, contract or otherwise," with a covenant of warranty against all persons claiming under L., his heirs and assigns; it was held, that the latter conveyance operated only upon lands, the right, title and interest of which was *then* in L. and which he derived from A. S., and consequently, could not defeat the operation of the first deed upon the land specifically conveyed.[1]

*450] Error to the Circuit Court for the district of Kentucky. *This was an action of ejectment, brought by the defendant in error, against the plaintiff in error, to recover the possession of certain lands in the state of Kentucky.

To support his action, the plaintiff below showed the following title: a patent to Alexander Skinner; the will of Alexander Skinner, devising all his estate to Henry Lee; and a deed from Henry Lee to Adam Craig, conveying the tract of land in controversy, specifically, by metes and bounds, describing himself as devisee of Skinner; with a regular deduction of title from Craig to the plaintiff. The deed from Lee to Craig was dated the 23d of December 1790; attested by three witnesses; acknowledged by the grantor, on the 15th of December 1795, before two justices of the peace in Virginia, and recorded in the court of appeals in Kentucky, on the 26th of July 1796. The execution of this deed was proved by one of the subscribing witnesses.

The defendant below produced in evidence a deed from Henry Lee to Henry Banks, dated the 5th of May 1795, acknowledged before the mayor of Richmond, Virginia, on the 13th of May 1795, and recorded in the court of appeals of Kentucky, on the 11th of July 1796, granting "all the right, title and claim which he the said Alexander Skinner had, and all the right, title and interest which the said Lee holds, as legatee and representative to the said Alexander Skinner, deceased, of all land, lying and being within the state of Kentucky, which cannot at this time be particularly described, whether they be by deed, patent, mortgage, surety, location, contract or *451] *otherwise," with a covenant of warranty against all persons claiming under Lee, his heirs and assigns.

Upon this testimony, the defendant's counsel moved the court to instruct the jury, that by virtue of the deed aforesaid, from Lee to Banks, first acknowledged and first recorded, the legal title was vested in the said Banks to the land in question; that the deed under which the plaintiff claimed was not operative and valid against the deed to Banks, and that the said deed to Banks showed such a legal title out of the plaintiff, as that he could not maintain his action. The question of fact, whether the deed of Lee to Craig was duly executed, on the day it bore date, was left by the court to the jury, who found a verdict for the plaintiff, subject to the opinion of the

[1] And see Lamb *v.* Kamm, 1 Sawyer 238.

court, upon the question of law arising in the cause. Judgment was thereupon rendered for the plaintiff, by the court below, and the cause was brought to this court by writ of error.

March 3d, 1818. The case was argued by *Talbot*, for the plaintiff in error, and by *Swann*, for the defendant in error.

March 7th. TODD, Justice, delivered the opinion of the court.—In this case, the question of fact, whether the deed of Henry Lee to Adam Craig was duly executed on the day it bears date, was left by the court to the jury, and upon the evidence, they properly found a verdict in favor of that deed, as an existing deed at that time.

The material question for the consideration of this *court is, whether, under the circumstances of this case, the deed of Henry [*452 Lee to Henry Banks, which was executed after, but recorded before, the deed of Lee to Craig, has a priority over the latter? This depends upon the construction of the terms of the conveyance from Lee to Banks; for if it conveys the same land as the deed to Craig, then the parties claiming under it, being *bonâ fide* purchasers, without notice of Craig's deed, are by law deemed to possess the better title.

It is necessary to bear in mind, that Alexander Skinner, by his will, devised all his real estate to Lee, and that Lee, by his deed to Craig, conveyed the tract of land in controversy, specifically, by metes and boundary, describing himself as devisee of Skinner. By his deed to Banks, he grants "all the right, title and claim, which he the said Alexander Skinner had, and all the right, title and interest which the said Lee holds, as legatee and representative to the said Alexander Skinner, deceased, of all land, lying and being within the state of Kentucky, which cannot at this time be particularly described, whether they be by deed, patent, mortgage, survey, location, contract or otherwise;" and then follows a covenant of warranty against all persons claiming under Lee, his heirs and assigns.

A conveyance of the right, title and interest in land, is certainly sufficient to pass the land itself, if the party conveying has an estate therein, at the time of the conveyance: but it passes no estate which was not *then* possessed by the party. If the deed to Banks had stopped after the words "all the right, *title and claim which Alexander Skinner had," there might [*453 be strong ground to contend, that it embraced all the lands to which Alexander Skinner had any right, title or claim, at the time of his death, and thus have included the lands in controversy. But the court is of opinion, that those words are qualified by the succeeding clause, which limits the conveyance to the right, title and claim, which Alexander Skinner had, at the time of his decease, and which Lee also held, at the time of his conveyance, and coupling both clauses together, the conveyance operated only upon lands, the right, title and interest of which was then in Lee, and which he derived from Skinner. This construction is, in the opinion of the court, a reasonable one, founded on the apparent intent of the parties, and corroborated the terms of the covenant of warranty. Upon any other construction, the deed must be deemed a fraud upon the prior purchaser; but in this way, both deeds may well stand together, consistently with the innocence of all parties.

Judgment affirmed.

*Evans v. Eaton.

Patent law.

Under the 6th section of the patent law of 1793, ch. 156, the defendant pleaded the general issue, and gave notice that he would prove at the trial, that the machine, for the use of which, without license, the suit was brought, had been used previous to the alleged invention of the plaintiff, in several places which were specified in the notice, or in some of them, "and also at sundry other places in Pennsylvania, Maryland and elsewhere in the United States;" the defendant having giving evidence as to some of the places specified, offered evidence as to others, not specified: *held*, that this evidence was admissible;[1] but the powers of the court, in such a case, are sufficient to prevent, and will be exercised to prevent, the patentee from being injured by surprise.

Testimony on the part of the plaintiff, that the persons of whose prior use of the machine the defendant had given evidence, had paid the plaintiff for licenses to use the machine, since his patent, ought not to be absolutely rejected, though entitled to very little weight.

Quære? Whether, under the general patent law, improvements on different machines can be comprehended in the same patent, so as to give a right to the exclusive use of several machines, separately, as well as a right to the exclusive use of those machines in combination?

However this may be, the act of the 21st January 1808, ch. 117, "for the relief of Oliver Evans," authorizes the issuing to him of a patent for his invention, discovery and improvements in the art of manufacturing flour, and in the several machines applicable to that purpose.

Quære? Whether congress can, constitutionally, decide the fact, that a particular individual is an author or inventor of a certain writing or invention, so as to preclude judicial inquiry into the originality of the authorship or invention?

Be this as it may, the act for the relief of Oliver Evans does not decide that fact, but leaves the question of invention and improvement open to investigation, under the general patent law.

Under the 6th section of the patent law, ch. 156, if the thing secured by patent had been in use, or had been described in a public *work, anterior to the supposed discovery, the patent is void, whether the patentee had a knowledge of this previous use or description, or not.

*455]

Oliver Evans may claim, under his patent, the exclusive use of his inventions and improvement in the art of manufacturing flour and meal, and in the several machines which he has invented, and in his improvement on machines previously discovered; but where his claim is for an improvement on a machine, he must show the extent of his improvement, so that a person understanding the subject may comprehend distinctly in what it consists.

The act for the relief of Oliver Evans is engrafted on the general patent law, so as to give him a right to sue in the circuit court, for an infringement of his patent-rights, although the defendant may be a citizen of the same state with himself.

Evans *v.* Eaton, Pet. C. C. 322, reversed.

ERROR to the Circuit Court for the district of Pennsylvania. This was an action brought by the plaintiff in error, against the defendant in error, for an alleged infringement of the plaintiff's patent-right to the use of his improved hopperboy, one of the several machines discovered, invented, improved and applied by him to the art of manufacturing flour and meal, which patent was granted on the 22d January 1808.

The defendant pleaded the general issue, and gave the notice hereafter stated. The verdict was rendered, and judgment given thereupon for the defendant, in the court below; on which the cause was brought, by writ of error, to this court.

At the trial in the court below, the plaintiff gave in evidence, the several acts of congress entitled respectively, "an act to promote the progress of useful arts, and to repeal the acts heretofore made for that purpose;" "an act to extend the privilege of obtaining patents, for useful discoveries

[1] But see R. S. § 4920.

and inventions, *to certain persons therein mentioned, and to enlarge and define penalties for violating the rights of patentees;" and "an act for the relief of Oliver Evans;" the said Oliver's petition to the secretary of state, for a patent,(a) and the patent thereupon granted *to the said Oliver, dated the 22d day of January, in the year 1808; (b) and fur- [*457

(a) To JAMES MADISON, Esq., Secretary of State:

The petition of Oliver Evans, of the city of Philadelphia, a citizen of the United States, respectfully showeth, that your petitioner having discovered certain useful improvements, applicable to various purposes, but particularly to the art of manufacturing flour and meal, prays a patent for the same, agreeably to the act of congress, entitled, "an act for the relief of Oliver Evans."

The principles of these improvements consist: 1. In the subdivision of the grain, or any granulated or pulverized substance; in elevating and conveying them from place to place, in small separate parcels; in spreading, stirring, turning and gathering them, by regular and constant motion, so as to subject them to artificial heat, the full action of the air to cool and dry the same, when necessary, to avoid danger from fermentation, and to prevent insects from depositing their eggs, during the operation of the manufacture. 2. In the application of the power which moves the mill, or other principal machine, to work any machinery which may be used to apply the said principles, or to perform the said operations, by constant motion and continued rotation, to save expense and labor.

The machinery by him already invented, and used for applying the above principles, consists of an improved elevator, an improved conveyor, an improved hopperboy, an improved drill, and an improved kiln-drier. For a particular explanation of the principles, and a description and application of the machines which he has so invented and discovered, he refers to the specifications and drawings hereunto annexed; and he is ready, if the secretary of the state shall deem it necessary, to deliver models of the said machines. OLIVER EVANS.

Description of the several machines invented by Oliver Evans, and used in his improvement on the process of the art of manufacturing flour or meal from grain, and which are mentioned in his specification as applicable to other purposes.

No. I. THE ELEVATOR.

Plate 6, Fig. 1. AB, represents an elevator for raising grain for the granary O, and conducting it, by spouts, into a number of different garners, as may be necessary, where a mill grinds separate parcels for toll or pay. The upper pulley being set in motion, and the little gate A drawn, the buckets fill as they pass under the lower, and empty as they pass over the upper pulley, and discharge into the movable spout B, to be by it directed to any of the different garners.

Fig. 2. Part of the strap and bucket, showing how they are attached. A, a bucket of sheet-iron, formed from the plate 8, which is doubled up and riveted at the corners, and riveted to the strap. B, a bucket made of tough wood, say willow, from the form 9, being bent at right angles at *e e*, one side and bottom covered with leather, and fastened to the strap, by a small strap of leather, passing through the main strap, and tacked to its sides. C, a lesser bucket of wood, bottomed with leather, the strap forming one side of it. D, a lesser bucket of sheet iron, formed from the plate 11, and riveted to the strap which forms one side of the bucket.

Fig. 6. The form of a gudgeon from the lower pulley. 7. The form of the gudgeons of the shaft of the upper pulley. 12. The form of the buckle for tightening the elevator strap.

Fig. 17, plate 7, represents an elevator applied to raise grain into a granary, from a

(b) See note b, page 461.

ther gave in evidence, *that an agent for the plaintiff, wrote a note to the
*459] defendant, in answer to which, he called on the *agent, at Chambers-
burg, at the house of Jacob Snyder, on the 9th of August 1813;
*460] there were a number *of millers present; the defendant then told

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wharf, &c., by a horse; 16 represents an elevator raising the meal in a grist-mill; 18 represents an elevator wrought by a man.

Plate 8, fig. 35, 39, represents an elevator raising grain from the hold of a ship; 33, 34, represents an elevator raising meal from three pair of stones, in a flour-mill, with all the improvements complete.

Plate 9, fig. 1. CD represents an elevator raising grain from a wagon; E represents the movable spout, and manner of fixing it, so as to direct the grain into the different apertments.

Plate 10, fig. 2, 3, and 11, 12, represents elevators, applied to raise rice in a mill for hulling and cleaning rice. The straps of elevators are best made of white harness leather.

No. II. The Conveyor.

Plate 6, fig. 8, represents a conveyor for conveying meal from the mill-stones into the elevator, stirring it to cool at the same operation, showing how the flights are set across the spiral line, to change from the principle of an endless screw to that of a number of ploughs, which answer better for the purpose of moving meal, showing also the lifting flights set broadside foremost, and the manner of connecting it to the lower pulley of the elevator which turns it.

Fig. 4. The gudgeon of the lower pulley of the elevator connected to the socket of the conveyor. 5. An end view of the socket, and the band which fastens it to the conveyor.

Plate 8, fig. 37, 36,—4 represents a conveyor for conveying grain from a ship to the elevator 4–5, with a joint at 36, to let it rise and lower with the tide. 44–45. A conveyor for conveying grain to different garners from an elevator. 31–32. A conveyor for conveying tail flour to the meal elevator, or the coarse flour to the eye of the stone.

Plate 9, fig. 11, represents a conveyor for conveying the meal from two pair of stones, to the elevator connected to the pulley, which turns them both.

Plate 10, fig. 2–11, represents conveyors applied to convey rice, in a rice-mill, from a boat or wagon to the elevator, or from the fan to an elevator.

No. III. The Hopperboy.

Plate 7, fig. 12, represents a hopperboy complete for performing all the operations specified, except only that one arm is shown. AB, the upright shaft; CED, the arms, with flights and sweeps. E, the sweeper to fill the bolting hoppers HH. CFE, the brace, or stay, for steadying the arms. P, the pulley, and W, the weight, that is to balance the arms, to make them play lightly on the meal, and rise or fall, as the quantity increases or diminishes. ML, the leader. N, the hitch stick, which can be moved along the leading line, to shorten or lengthen it.

Fig. 13, SSS, the arms turned bottom up, showing the flights and sweepers comple at one end, and the lines on the other end show the mode for laying out for the flights, so as to have the right inclination and distance, according to the circle described by each, and so that the flights of one end may track between those of the other. The sweepers and the flights at each end of the arms are put on with a thumb-screw, so that they may be moved, and so that these flights may be reversed, to drive meal outwards from the centre, and at the same time trail it round the whole circle: this is of use sometimes, when we wish to bolt one quantity which we have under the hopperboy, without bolting that which we are grinding, and yet to spread that which we are grinding, to dry and cool, laying round the hopperboy, convenient to be shovelled under it, as soon as we wish to bolt it.

Fig. 15. The form of the pivot for the bottom of the upright shaft. 14. The

the agent, that he had got Mr. Evans' book, a plate in *the Millwright's Guide, and if the agent would take $40, the defendant would give it him; the *defendant said that his hopperboy was taken from a plate [*462 in Mr. Evans' book: he said, he would give no more, alleging, that

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plate put on the bottom of the shaft, to rest on the shoulder of the pivot; this plate is to prevent the arm from descending so low as to touch the floor.

Plate 8, fig. 25, represents a hopperboy attending two bolts in a mill, with all the improvements complete.

Plate 9. The hopperboy is shown over QQ. Fig. 4 is the arm turned upside down, to show the flights and sweepers.

No. IV. The Drill.

Plate 6, fig. 1. HG represents a drill conveying grain from the different garners to the elevator, in a mill for grinding parcels for toll or pay.

Plate 7, fig. 17. Bd a drill, conveying meal from the stones in a grist-mill to the elevator. The strap of this machine may be made broad, and the substance to be moved may be dropped on its upper surface, to be carried and dropped over the pulley at the other end: in this case, it requires one bucket like those of the elevator, to bring up any that may spill off the strap.

For full and complete directions for proportioning all the parts, constructing, and using the above-described machines, see the book which I have published for that express purpose, entitled, "The Young Millwright and Miller's Guide." See plate 8, representing a mill, with three pair of mill-stones, with all the improvements complete, except the kiln-drier.

No. V. The Kiln-Drier.

Plate 9, fig. 2. A, the stove, which may be constructed simply of six plates, and inclosed by a brick-wall lined with a mortar composed of pulverized charcoal and clay. B, the pipe for carrying off the smoke. CC, the air-pipes, connecting the space between the stove and wall with the conveyor. DD, the pipes for the heated air to escape. The air is admitted at the air-hole below, regulated by a register, as experience shall teach to be best, so as not to destroy the principle which causes the flour to ferment easily, and rise in the process of baking. The conveyors must be covered close; the meal admitted by small holes as it falls from the mill-stones.

Witness, { Saml. H. Smith, / Jo. Gales, jun'r. } Oliver Evans.

(*b*) The United States of America: To all whom these Letters-patent shall come:

Whereas, Oliver Evans, of the city of Philadelphia, a citizen of the United States, hath alleged that he hath invented a new and useful improvement in the art of manufacturing flour and meal, by means of certain machines, which he terms an improved elevator, an improved conveyor, an improved hopperboy, an improved drill, and an improved kiln-drier: which machines are moved by the same power that moves the mill or other principal machinery, and in their operation subdivide any granulated or pulverized substance, elevate and carry the same from place to place, in small and separate parcels, spread, stir, turn and gather them by regular and constant motion, so as to subject them to artificial heat, and the air to dry and cool, when necessary: a more particular and full description in the words of the inventor is hereby annexed in a schedule; which improvement has not been known or used before his application; has affirmed that he does verily believe that he is the true inventor or discoverer of the said improvement, and agreeably to the act of congress entitled, "an act for the relief of Oliver Evans," which authorizes the secretary of state to secure to him by patent, the exclusive right to the use of such improvement in the art of manufacturing flour and meal, and in the several machines which he has discovered, improved and applied to that purpose; he has paid into the treasury of the United States, the sum

the $100 the agent asked was too much; that the stream on which his mill was, was a small head of Conogocheage. The agent then declared, that if the defendant would not pay him by Monday morning, he would commence a suit in the circuit court.

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of thirty dollars, delivered a receipt for the same, and presented a petition to the secretary of state, signifying a desire of obtaining an exclusive property in the said improvement, and praying that a patent may be granted for that purpose: These are therefore to grant, according to law, to the said Oliver Evans, his heirs, administrators or assigns, for the terms of fourteen years, from the twenty-second day of January 1808, the full and exclusive right and liberty of making, using and vending to others to be used, the said improvement, a description whereof is given in the words of the said Oliver Evans himself, in the schedule hereto annexed, and is made a part of these presents. In testimony whereof, I have caused these letters to be made patent, and the seal of the United States to be hereunto affixed.

Given under my hand, at the city of Washington, this twenty-second day of January, in the year of our Lord, one thousand eight hundred and eight, and of the independence of the United States of America, the thirty-second.

SEAL.

TH: JEFFERSON.

By the President,

JAMES MADISON, Secretary of State.

City of Washington, to wit:

I do hereby certify, that the foregoing letters-patent were delivered to me on the twenty-second day of January, in the year of our Lord, one thousand eight hundred and eight, to be examined; that I have examined the same, and find them conformable to law. And I do hereby return the same to the secretary of state, within fifteen days from the date aforesaid, to wit: on this twenty-second day of January, in the year aforesaid.

C. A. RODNEY, Attorney-General of the United States.

THE SCHEDULE

Referred to in these letters-patent, and making part of the same, containing a description, in the words of the said Oliver Evans, of his improvements in the art of manufacturing flour and meal.

My first principle is, to elevate the meal as fast as it is ground, in small separate parcels, in continued succession and rotation, to fall on the cooling floor, to spread, stir, turn and expose it to the action of the air, as much as possible, and to keep it in constant and continual motion, from the time it is ground, until it be bolted: this I do, to give the air full action, to extract the superfluous moisture from the meal, while the heat, generated by the friction of grinding, will repel and throw it off, and the more effectually dry and cool the meal fit for bolting, in the course of the operation, and save time and expense to the miller. Also to avoid all danger from fermentation, by its laying warm in large quantities, as is usual; and to prevent insects from depositing their eggs, which may breed the worms often found in good flour. And further to complete this principle, so as to dry the meal more effectually, and to cause the flour to keep sweet a longer space of time, I mean to increase the heat of the meal, as it falls ground from the millstones, by application of heated air, that is to say, to kiln-dry the meal as it is ground, instead of kiln-drying the grain as usual. The flour will be fairer and better than if made from kiln-dried grain, the skin of which is made so brittle, that it pulverizes and mixes with the flour. This principle I apply by various machines which I have invented, constructed and adapted to the purposes hereafter specified, numbered 1, 2, 3, 4, 5.

My second principle is, to apply the power that moves the mill or other principal machine to work my machinery, and by them to perform various operations which have

The plaintiff further gave in evidence, that another agent for the plaintiff was in the defendant's mill, on the second of November 1814, and saw a hopperboy there, on the principles and construction of the plaintiff's hopperboy. This witness had heard that a *right was obtained under Pennsylvania; but did not know of any rights under Pennsylvania, [*463

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always heretofore been performed by manual force, and thus greatly to lessen the expense and labor of attending mills and other works.

The application of those principles, including that of kiln-drying the meal, during the process of the manufacture, or otherwise to the improvement of the process of manufacturing flour, and for other purposes, is what I claim as my invention and improvement in the art, as not having been known or used before my discovery, knowing well that the principles once applied by one set of machinery, to produce the desired effect, others may be contrived and variously constructed, and adapted to produce like effects in the application of the principles, but perhaps, none to produce the desired effect more completely than those which I have invented and adapted to the purpose, and which are hereinafter specified.

No. 1. THE ELEVATOR. Its use is to elevate any grain, granulated or pulverized substances. Its use in the manufacture of flour or meal is to elevate the meal from the millstones in small separate parcels, and to let it fall through the air on the cooling floor, as fast as it is ground. It consists of an endless strap, rope or chain, with a number of small buckets attached thereto, set to revolve round two pulleys, one at the lowest, and the other at the highest point between which the substance is to be raised. These buckets fill as they turn under the lower, and empty themselves as they turn over the upper pulley. The whole is inclosed by cases of boards to prevent waste.

No. 2. THE CONVEYOR. Its use is to convey any grain, granulated or pulverized substances, in a horizontal, ascending or descending direction. Its use in the process of the art of manufacturing flour, is to convey the meal from the mill-stones, as it is ground, to the elevator, to be raised, and to keep the meal in constant motion, exposing it to the action of the air; also, in some cases, to convey the meal from the elevator to the bolting hopper, and to cool and dry it fit for bolting, instead of the hopperboy, No. 3; also to mix the flour, after it is bolted; also to convey the grain from one machine to another, and in this operation, to rub the impurities off the grain. It consists of an endless screw, set to revolve in a tube, or section of a tube, receiving the substance to be moved at one end, and delivering it at the other end; but for the purpose of conveying flour or meal, I construct it as follows: instead of making it a continued spiral, which forms the endless screw, I set small boards, called flights, at an angle crossing the spiral line; these flights operate like so many ploughs following each other, moving the meal from one end of the tube to the other, with a continued motion, turning and exposing it to the action of the air, to be cooled and dried. Sometimes, I set some of the flights to move broadside foremost, to lift the meal from one side, to fall on the other, to expose it to the air more effectually.

No. 3. THE HOPPERBOY. Its use is to spread any grain, granulated or pulverized substances, over a floor or even surface, to stir it and expose it to the air, to dry and cool it, when necessary, and at the same time, to gather it from the circumference of the circle it describes, to or near the centre, or to spread it from the centre to the circumference, and leave it in the place where we wish it to be delivered, when sufficiently operated on. Its use in the process of manufacturing flour, is to spread the meal as fast as it falls from the elevator over the cooling floor, on the area of a circle of from eight to sixteen feet, more or less, in diameter, according to the work of the mill, to stir and turn it continually, and to expose it to the action of the air to be dried and cooled, and to gather it into the bolting hoppers, and to attend the same regularly. It consists of an upright shaft, made round at the lower end, about two-thirds of its length, and set to revolve on a pivot in the centre of the cooling floor; through this shaft, say five feet from the floor, is put a piece called the leader, and the lower end of

sold by the plaintiff; and did not know that it was erected in any mill,
*464] after the patent under Pennsylvania. The defendant's *hopperboy had an upright shaft, with a leading arm, in the first place, and

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the shaft passes very loosely through a round hole in the centre of another piece called the arms, say from eight to sixteen feet in length, this last piece revolving horizontally, describes the circle of the cooling floor, and is led round by a cord, the two ends of which are attached to the two ends of the arms, and passing through a hole at each end of the leader, so that the cord will reeve to pull each end of the arms equally. The weight of the arms is nearly balanced by a weight hung to a cord, which is attached to the arms, and passes over a pulley, near to the upper end of the upright shaft, to cause the arms to play lightly, pressing with only part of their weight on the meal that may be under it. The foremost edges of the arms are sloped upwards, to cause them to rise over and keep on the surface of the meal as the quantity increases; and if it be used separately, and unconnected with the elevator, the meal may be thrown with shovels, within its reach, while in motion, and it will spread it level, and rise over it until the heap be four feet high or more, which it will gather into the hoppers, always taking from the surface, after turning it to the air a great number of times. The underside of these arms are set with little inclining boards, called flights, about four inches apart, next the centre, and gradually closing to about two inches, next the extremities, the flights of the one arm to track between those of the other, they operate like ploughs, and at every revolution of the machine they give the meal two turns towards the centre of the circle, near to which are generally the bolting hoppers. At each extremity of the arms, there is a little board attached to the hindmost edge of the arm, to move side foremost; these are called sweepers; their use is to receive the meal as it falls from the elevator, and trail it round the circle described by the arms, that the flights may gather towards the centre, from every part of the circle; without these, this machine would not spread the meal over the whole area of the circle described by the arms. Other sweepers are attached to that part of the arms which pass over the bolting hoppers, to sweep the meal into them.

But if the bolting hoppers be near a wall, and not in the centre of the cooling floor, then, in this case, the extremity of the arms are made to pass over them, and the meal from the elevator let fall near the centre of the machine, and the flights are reversed, to turn the meal from the centre towards the circumference, and the sweepers will sweep it into the hoppers. Thus, this machine receives the meal as it falls from the elevator, on the cooling floor, spreads it over the floor, turns it twice over at every revolution, stirs and keeps it in continual motion, and gathers it, at the same operation, into the bolting hoppers, and attends them regularly. If the bolting reels are stopped, this machine spreads the meal and rises over it, receiving under it from one, two, to three hundred bushels of meal, until the bolts are set in motion again, when it gathers the meal into the hoppers, and as the heap diminishes, it follows it down, until all is bolted. I claim as my invention, the peculiar properties or principles which this machine possesses, viz., the spreading, turning and gathering the meal at one operation, and the rising and lowering of its arms by its motion, to accommodate itself to any quantity of meal it has to operate on.

No. 4. The Drill. Its use is to move any grain, granulated or pulverized substance, from one place to another: it consists, like the elevator, of an endless strap, rope or chain, &c., with little rakes instead of buckets (the whole cased with boards to prevent waste), revolving round two pulleys or rollers. Its use in the process of the manufacture of flour, is to draw or rake the grain or meal from one part of the mill to another. It receives it at one pulley, and delivers it at the other, in a horizontal, ascending or descending direction, and in some cases may be more conveniently applied for that purpose than the conveyor. I claim the exclusive right to the principles, and to all the machines above specified, and for all the uses and purposes specified, as not having been heretofore known or used before I discovered them. They may all be

a large arm inserted *with flights, and leading lines, and sweepers; a little board, for the purpose of sweeping the meal in the *bolting hoppers, and spreading it over the floor; a balance weight, to cause [*466

united and combined in one flour mill, to produce my improvement on the art of manufacturing flour complete, or they may each be used separately, for any of the purposes specified and alloted to them, or to produce my improvement in part, according to the circumstances of the case.

No. 5. THE KILN-DRIER. To kiln-dry the meal, after it is ground, and during the operation of the process of manufacturing flour, I take a close stove, of any common form, and inclose it with a wall made of the best non-conductor of heat, leaving a small space between the stove and the wall, to admit air to be heated in its passage through this space. I set this stove below the conveyor that conveys the meal from the mill-stones, as ground, into the elevator, and I connect the space between the stove and the wall to the conveyor tube, by a pipe entering near the elevator, and I cover the conveyor close, and set a tube to rise from the end of the conveyor tube, near the mill-stones, for the heated air to ascend and escape as up a chimney. I make fire in the stove, and admit air at the bottom of the space, between it and the wall round it, to be heated and pass along the conveyor tube, meeting the meal which will be heated by the hot air, and the superfluous moisture will be more powerfully repelled and thrown off, and the meal will be dried and cooled, as it passes through the operation of the elevator and hopperboy. The flour will be fairer than if the grain had been kiln-dried, and it will keep longer sweet than flour not kiln-dried. I set all my machines in motion by the common means of cog and round tooth, and pinion straps, ropes or chains, well-known to every millwright.

Arrangement and connection of the several machines, so as to apply my principles to produce my improvements complete. I fix a spot through the wall of the mill, for the grain to be emptied into from the wagoner's bag, to run into a box, hung at the end of a scale-beam, to weigh a wagon load at a draught. From this box it descends into the grain elevator, which raises it to a granary over the cleaning machines, and as it passes through them, it may be directed into the same elevator to ascend to be cleaned a second time, and then descends into a granary, over the hopper of the mill-stones, to supply them regularly, and as ground, it falls from the several pair of mill-stones into the conveyors, where it is dried by the heated air of the kiln-drier, and is conveyed into the meal elevator, to be raised and dropped on the cooling floor, within reach of the hopperboy, which receives and spreads it over the whole area of the circle which it describes, stirring and turning it continually, and gathering it into the bolting hoppers which it attends regularly. That part of the flour which is not sufficiently bolted by the first operation, is conveyed by a conveyor or drill, into the elevator, to ascend with the meal, to be bolted over again, and that part of the meal which has not been sufficiently ground at the first operation, is conveyed by a conveyor or drill, and let run into the eye of the mill-stone to be ground over.

Thus the whole of the operations which used to be performed by manual labor, is, from the time the wheat is emptied from the wagoner's bag, or from the ship's measure, until it enters the bolts, and the manufacture be completed in the most perfect manner, performed by the machinery moved by the power which moves the mill, and this machinery keeps the meal in constant motion, during the whole process, drying and cooling it more completely, avoiding all danger from fermentation, and preventing insects from depositing their eggs, and performing all the operations of grinding and bolting to much greater perfection, making the greatest possible quantity of the best quality of flour out of the grain, saving much time and labor and expense to the miller, and preventing much from being wasted by the motion of the machines being so slow as to cause none of the flour to rise in form of dust, and be carried away by the air, and the cases of the machine being made close, prevents any from being lost.

Witnesses { Samuel H. Smith, Jo. Gales, jun. } OLIVER EVANS.

the arms to play up and down lightly over the meal. The leading arms were abont five *feet long, and seemed to be in proportion, the arm
*467] about fourteen, and the length of the sweep about nine inches. *And
to the defendant, having previously given the plaintiff written notice,
*470] that upon the trial of the *cause, the defendant would give in evidence, under the general issue, the following special matter, to *wit:

"1st. That the improved hopperboy, for which, *inter alia*, the plaintiff in his declaration alleges he *has obtained a patent, was not origin-
*471] ally discovered by the patentee, but had been in use anterior to the supposed discovery of the patentee, in sundry places, to wit: at the mill of George Fry and Jehu Hollingsworth, in Dauphin county, Pennsylvania; at Christian Stauffer's mill, in Warwick township, Lancaster county, state of Pennsylvania; at Jacob Stauffer's mill, in the same county; at Richard Downing's mill, in Chester county, Pennsylvania; at Buffington's mill, on the Brandywine; at Daniel Huston's mill, in Lancaster county, Pennsylvania; at Henry Stauffer's mill, in York county, Pennsylvania; and at Dihl's mill, in the same county, or at some of the said places, and also at sundry other places in the said state of Pennsylvania, the state of Mary-
*472] land and elsewhere *in the United States.

"2d. That the patent given to the plaintiff, as he alleges in his declaration, is more extensive than his discovery or invention, for that certain parts of the machine in said patent, called an improved hopperboy, and which the plaintiff claims as his invention and discovery, to wit, the upright shaft, arms, and flights, and sweeps, or some of them, and those parts by which the meal is spread, turned and gathered at one operation, and also several other parts, were not originally invented and discovered by him, but were in use prior to his said supposed invention or discovery, to wit, at the places above mentioned, or some of them.

"3d. That the said patent is also more extensive than the plaintiff's invention or discovery; for that the application of the power that moves the mill or other principal machine to the hopperboy is not an original invention or discovery of the plaintiff, but was in use anterior to his said supposed invention or discovery, to wit, at the places before mentioned, or some of them.

4th. That the said patent is void, because it purports to give him an exclusive property in an improvement in the art of manufacturing meal, by means of a certain machine, termed an improved hopperboy, of which the said plaintiff is not the original inventor or discoverer; parts of the machine in the description thereof referred to by the patent, having been in use anterior to the plaintiff's said supposed discovery, to wit, at the places above men-
*473] tioned, or some of them; and the said patent and description therein referred to contains no statement, specification or description, *by

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Washington County, District of Columbia, viz:

This 4th day of November 1807, personally appeared before me, a justice of the peace in and for said county, Oliver Evans, who, being duly affirmed according to law, declares that he is a citizen of the United States, and that his usual place of residence is in the city of Philadelphia, and that he verily believes that he is the true and original inventor of the improvements herein above specified, for which he solicits a patent.

Affirmed before me, OLIVER EVANS.

SAM. H. SMITH.

which those parts, so used as aforesaid, may be distinguished from those of which the said plaintiff may have been the inventor, or discoverer, protesting at the same time that he has not been the inventor or discoverer of any of the parts of the said machine.

5th. That the improved elevator, described in the declaration, or referred to therein, was not originally discovered by the plaintiff, but was anterior to his said supposed discovery or invention, described in certain public works, or books, to wit, in Shaw's Travels; in the first volume of the Universal History; in the first volume of Mormer's Husbandry; in Ferguson's Mechanics; in Bossuet's Histoire des Mathematiques; in Wolf's Cours des Mathematiques; in Desagulier's Experimental Philosophy, and in Proney's Architecture Hydraulique, or some of them.

6th. That the said patent is more extensive than the invention or discovery of the plaintiff, because certain parts of the machine called an improved elevator, were, anterior to the plaintiff's said supposed invention or discovery, described in certain public works, or books, to wit, the works or books above mentioned, or some of them; and that the said patent is void, because it neither contains or refers to any specification or description by which the parts so before described in the said public works, may be distinguished from those parts of which the plaintiff may be the inventor or discoverer, protesting, at the same time, that he has not been the inventor or discoverer of any of the parts of the said machine."

He gave in evidence the existence of hopperboys, prior to the plaintiff's alleged discovery, at sundry mills in the state of Pennsylvania, *mentioned in the said notice; and further offered to give in evidence the [*474 existence of hopperboys, prior to the plaintiff's alleged discovery, at sundry other mills, in the state of Pennsylvania, not mentioned in the said notice; and the counsel for the plaintiff objected to the admission of any evidence of the existence of hopperboys in the said mills not mentioned in the said notice. But the court decided that such evidence was competent and legal. To which decision the counsel for the plaintiff excepted.

The plaintiff, after the above evidence had been laid before the jury, offered further to give in evidence, that certain of the persons mentioned in the defendant's notice as having hopperboys in their mills, and also certain of the persons not mentioned in the said notice, but of whom it had been shown by the defendant, that they had hopperboys in their mills, had, since the plaintiff's patent, paid the plaintiff for license to use his improved hopperboy in the said mills respectively. But the counsel for the defendant objected to such evidence, as incompetent and illegal, and the court refused to permit the same to be laid before the jury. To which decision, the plaintiff's counsel excepted.

The court below charged the jury, that the patent contained no grant of a right to the several machines, but was confined to the improvement in the art of manufacturing flour by means of those machines; and that the plaintiff's claim must, therefore, be confined to the right granted, such as it was. That it had been contended, that the schedule was part of the patent, and contained a claim to the invention of the peculiar properties and principles of the hopperboy, as *well as the other machines. But the [*475 court was of opinion, that the schedule was to be considered as part of the patent, so far as it is descriptive of the machines, but no further;

and even if this claim had been contained in the body of the patent, it would have conferred no right which was not granted by that instrument.

The court further proceeded to instruct the jury, that the law authorized the president to grant a patent, for the exclusive right to make, construct, use and vend to be used, any new and useful art, machine, manufacture, or composition of matters or any new and useful improvement, in any art, machine, &c., not known or used before the application. As to what constitutes an improvement, it is declared, that it must be in the principle of the machine, and that a mere change in the form or proportions of any machine shall not be deemed a discovery. Previously to obtaining the patent, the applicant is required to swear, or affirm, that he verily believes that he is the true inventor or discoverer of the art, machine or improvement for which he solicits a patent; and he must also deliver a written description of his invention, and of the manner of using it, so clearly and exactly, as to distinguish the same from all other things before known, and to enable others, skilled in the art, to construct and use to same. That from this short analysis of the law, the following rules might be deduced. 1st. That a patent may be for a new and useful art; but it must be practical; it must be applicable and referrible by something by which it may be proved to be useful; a mere abstract principle cannot be appropriated by patent. 2d. The discovery must not only be useful, but new; it must not have been *known or *476] used before in any part of the world. It was contended by the plaintiff's counsel that the title of the patentee cannot be impeached, unless it be shown that he knew of a prior discovery of the same art, machine, &c., and that said true and original are synonymous terms in the intention of the legislature. But, as it was not pretended, that those term meant the same thing, in common parlance, neither was it the intention of the legislature to use them as such. The first section of the law referring to the allegations of the application for a patent, speaks of the discovery as something "not known or used before the application;" and in the 6th section it is declared, that the defendant may give in evidence that the thing secured by patent, was not originally discovered by the patentee, but had been in use, or had been described in some public work anterior to the supposed discovery. 3d. If the discovery be of an improvement only, it must be an improvement in the principle of a machine, art or manufacture, before known or used; if only in the form or proportion, it has has not the merit of a discovery, which can entitled the party to a patent. 4th. The grant can only be for the discovery, as recited and described in the patent and specification. If the grantee is not the original discoverer of the art, machine, &c., for which the grant is made, the whole is void. Consequently, if the patent be for the whole of the machine, and the discovery were of an improvement, the patent is void. 5th. A machine, or an improvement, may be new, and the proper subject of a patent, though the parts of it were before known and in use. The combination, therefore, of old machines, to produce a new *477] *and useful result, is a discovery for which a patent may be granted.

The above principles would apply to most of the questions that had been discussed. It was strongly insisted on by the defendant's counsel, that this patent is broader than the discovery; the evidence proving, that in relation to the hopperboy, for the using of which this suit is brought, the plaintiff can pretend to no discovery beyond that of an improvement in a

machine known and used before the alleged discovery of the plaintiff. This argument proceeded upon the supposition, that the plaintiff had obtained a patent for the hopperboy, which was entirely a mistake. The patent was "for an improvement in the art of manufacturing flour," by means of a hopperboy and four other machines described in the specification, and not for either of the machines so combined and used. That the plaintiff is the original discoverer of this improvement, was contested by no person, and therefore, it could not, with truth, be alleged, that the patent is broader than the discovery, or that the plaintiff could not support an action on this patent against any person who should use the whole discovery.

But could he recover against a person who had made or used one of the machines, which in part constitute the discovery? The plaintiff insisted that he could, because, having a right to the whole, he is necessarily entitled to the parts of which that whole is composed. Would it be seriously contended, that a person might acquire a right to the exclusive use of a machine, because when used in combination with others, a new and useful result is produced, which he could not have acquired, independent of that combination? *If he could, then if A. were proved to be the original inventor [*478
of the hopperboy; B. of the elevator, and so on, as to the other machines, aad either had obtained patents for their respective discoveries, or chose to abandon them to the public, the plaintiff, although it was obvious, he could not have obtained separate patents for those machines, might nevertheless, deprive the original inventors, in the first instance, and the public, in the latter, of their acknowledged right to use those discoveries, by obtaining a patent for an improvement, consisting in a combination of those machines to produce a new result.

The court further charged the jury, that it was not quite clear, that this action could be maintained, although it was proved beyond all controversy, that the plaintiff was the original inventor of this machine. The patent was the foundation oi the action, and the gist or the action was, the violation of a right which that instrument had conferred. But the exclusive right of the hopperboy was not granted by this patent, although this particular machine constitutes a part of the improvement of which the plaintiff is the original inventor, and it is for this improvement, and this only, that the grant is made. If the grant, then, was not of this particular machine, could it be sufficient, for the plaintiff to prove in this action, that he was the original inventor of it?

Again, could the plaintiff have obtained a separate patent for the hopperboy, in case he were the original inventor of it, without first swearing or affirming, that he was the true inventor of that machine? Certainly not. Has the plaintiff then taken, or could he have taken, such an oath in this case? Most assuredly he could not; because the prescribed form of the oath *is, [*479
that it is the inventor of the art, machine or manufacture for which he solicits a patent. But since the patent which he solicited was not for the hopperboy, but for an improvement in the manufacture of flour, he might, with safety, have taken the oath prescribed by law, although he knew. at the time, that he was not the true inventor of the hopperboy; and thus it would happen, that he could indirectly obtain the benefit of a patent-right to the particular machine, which he could not directly have obtained, without doing what, it must be admitted, in this case, he had not done.

But this was not all. If the law had provided for fair and original discoverers a remedy, when their rights are invaded by others, it had likewise provided corresponding protection to others, where he has not the merit. What judgment could the district court have rendered upon a *scire facias* to repeal this patent, if it had appeared, that the plaintiff was not the true and original inventor of the hopperboy? Certainly not that which the law has prescribed, viz., the repeal of the patent; because it would be monstrous to vacate the whole patent, for an invention of which the patentee was the acknowledged inventor, because he was not the inventor of one of the constituent parts of the invention for which no grant is made. But the court would have no alternative, but to give such a judgment, or, in effect, to dismiss the *scire facias;* and if the latter, then the plaintiff would have beneficially the exclusive right to a machine, which could not be impeached in the way prescribed by law, although it should be demonstrated, that he was
*480] not either the true or the original inventor of it. And *supposing the jury should be of opinion, and so find, that the plaintiff was not the original inventor of this machine, would not the court be prevented from declaring the patent void, under the provisions of the 6th section of the law, for the reason assigned why the district court could not render judgment upon a *scire facias?* Indeed, it might well be doubted, whether the defence now made by the defendant could be supported at all, in this action (if this action could be maintained), inasmuch as the defendant cannot allege, in the words of the 6th section, that the thing secured by patent was not originally discovered by the patentee, since, in point of fact, the thing patented was originally discovered by the patentee, although the hopperboy may not have been so discovered. But if this defence could not be made, did not that circumstance afford a strong argument against this action? If the plaintiff was not the inventor of the parts, he had no right to complain that they were used by others, if not in a way to infringe his right to their combined effect. If he was the original inventor of the parts which constitute the whole discovery, or any of them, he might have obtained a separate patent for each machine of which he was the original inventor.

Upon the whole, although the court gave no positive opinion upon this question, they stated, that it was not to be concluded, that this action could be supported, even if it were proved, that the plaintiff was the original inventor of the hopperboy. But if an action would lie upon this patent, for the violation of the plaintiff's right to the hopperboy, still the plaintiff could
*481] not recover, if it had been shown to the satisfaction of the *jury, that he was not the original discoverer of that machine.

It appeared, by the testimony of the defendant's witnesses, that Stauffer's hopperboy was in use many years before the alleged discovery of the plaintiff; that the two machines differed from each other very little in form, in principle or in effect. They were both worked by the same power which works the mill; and they both stir, mix, cool, dry and conduct the flour to the bolting chest. Whether the flights and sweepers in the plaintiff's hopperboy were preferable to the slips attached to the under part of the arm in Stauffer's; or whether, upon the whole, the former is a more perfect agent in the manufacture of flour than the latter, were questiont which the court would not undertake to decide; because, unless the plaintiff was the original inventor of the hopperboy, although he had obtained a separate patent for it,

he could not recover in this action, however useful the improvement might be, which he had made in that machine. If the plaintiff had obtained a patent for his hopperboy, it would have been void, provided the jury should be of opinion, upon the evidence, that his discovery did not extend to the whole machine, but merely to an improvement on the principle of an old one, and if this should be their opinion, in the present case, the plaintiff could not recover.

It had been contended by the plaintiff's counsel, that the defendant, having offered to take a license from the plaintiff, if he would consent to reduce the price of it to $40, he was not at liberty to deny that the plaintiff is the original inventor of this machine. *This argument had no weight in [*482
it, not merely because the offer was rejected by the plaintiff's agent, and was, therefore, as if it had not been made; but because the law prevents the plaintiff from recovering, if it appear on the trial, that he was not the original inventor. If the offer amounted to an acknowledgment that the plaintiff was the original inventor (and further it could not go), this might be used as evidence of that fact, but it would not entitle the plaintiff to a verdict, if the fact proved to be otherwise.

The plaintiff's counsel had also strongly insisted, that under the equity of the tenth section of the law, the defence set up in this case ought not to be allowed, after three years from the date of the patent. This argument might, perhaps, with some propriety, be addressed to the legislature, but was improperly urged to the court. The law had declared, that in an action of this kind, the defendant may plead the general issue, and give in evidence that the plaintiff was not the original inventor of the machine for which the patent was granted. The legislature has not thought proper to limit this defence in any manner; and the court could not do it.

But what seemed to be conclusive of this point was, that the argument would tend to defeat altogether the provision of the sixth section, which authorizes this defence to be made; for, if it could not be set up, after three years from the date of the patent, it would be in the power of the patentee to avoid it altogether, by forbearing to bring suits, until after the expiration of that period. And thus, although the law has carefully *provided [*483
two modes of vacating a patent improvidently granted, the patentee, though not the original inventor, and however surreptitiously he may have obtained his patent, may secure his title to the exclusive use of another's invention, if he can for three years avoid an inquiry into the validity of his title.

The last point was, that Stauffer's invention was abandoned, and, consequently, might be appropriated by the plaintiff. But if Stauffer was the original inventor of the hopperboy, and chose not to take a patent for it, it became public property by his abandonment; nor could any other person obtain a patent for it, because no other person would be the original inventor. To this charge, the plaintiff's counsel excepted.

February 6th. *C. J. Ingersoll*, for the plaintiff, premised, that this patent granted an exclusive right for fourteen years, in the improvement in the art, by means of the five machines, and for the several machines; the peculiar properties of each, in its practical results, and the improvement of the art, by the combination of the whole. The proof of this position is,

that the defendant used the precise machine, copied from the plaintiff's publication, and offered to pay for it; but they differed in price, which led to the contesting the originality of the plaintiff's invention.

1. It is said, in the charge of the court below, that the action is founded on the patent, which contains no grant of a right to the several machines, but is confined to the improvement in the art, by means of those machines.

*484] The patent is to be made out in the *manner and form prescribed by the general act. What are that manner and form? By reciting the allegations and suggestions of the petition; giving a short description of the invention or discovery; and thereupon granting an exclusive right in the said invention or discovery. The manner and form of these letters-patent are a recital of—1st. The citizenship of the patentee: 2d. The allegations and suggestions of the petition, as to both the improvement and the machines, in a short description, referring to the annexed schedule for one more full and particular in the inventor's own words: 3d. That he has petitioned agreeable to the special act: 4th. A grant of the said improvement. The description must be short and referential. It must be a description. By the first section of the act of the 10th of April 1790, ch. 34, it was to be described clearly, truly and fully; perhaps, because the board, constituted by that law, was to decide whether they deemed the discovery or invention sufficiently useful or important for letters-patent. The patent, by express reference, adopts the special act *in extenso*. The connecting terms *which* and *said*, bind the whole to the granting clause; the allegations and suggestions recited are part of the grant: the machines are the means of every end, particular as well as general; nor can there be any practical result without them. To confine such a patent to one general result from a combination of the whole machines, nullifies it. It is never so in practice, and would operate infinite injustice in other cases.

*485] 2. But the schedule is part of the patent in all cases: *in this case, it is especially so. By the act of 1790, ch. 34, § 6, the patent or specifications are *primâ facie* proof of everything which it is incumbent on the plaintiff to establish; and by the existing law, the specification is considered as explanatory of the terms used in the patent, so as to limit or enlarge the grant. *Whittemore* v. *Cutter*, 1 Gallis. 437. But it is said in the grant, that the schedule annexed is made part of the patent. It is made so by the public agent, to avoid trouble, litigation and unnecessary recitals. The petition, schedule and description are all referred to, and incorporated with the patent. What does the law mean by a recital of allegations and suggestions? What more can a petitioner do than allege and suggest? He cannot shape or prescribe the manner and form of the grant. The charge denies that the schedule, at any rate, is more than descriptive of the machines, or that it would confer any right, even if claimed in the patent. But if no right would be conferred by insertion in the grant itself, what becomes of the argument which ascribes such potency to the grant? The charge says, the grant can only be for the discovery, as recited and described in the patent and specification. The grant is not for the parts, because it is for the whole; not in their rudiments or elements; not for wheels, cogs or weights, nor for wood, iron or leather; but for the peculiar properties, the new and useful practical results from each machine, and the vast improvements from their combination in this art. The charge supposes it

impossible to obtain a patent *for a hopperboy, unless the plaintiff could swear that he invented that machine. But the oath is not a material, or at least, not an indispensable pre-requisite. *Whittemore* v. *Cutter*, 1 Gallis. 433.

3. The special act for the relief of the plaintiff, decides him to be the inventor of the machines and improvements for which he has obtained a patent. By the constitution, art. 1, § 8, congress have power to promote the progress of science and the useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries. This has been done by congress in the instance of the plaintiff. The special act is an absolute grant to him, binding on all the community, and precluding any inquiry into the originality of the invention. It includes a monoply in his invention, discovery and improvements in the art, and in the several machines discovered, invented, improved and applied, for that purpose. The patent is to issue on a simple application in writing by the plaintiff, without any pre-requisites of citizenship, oath, fee, or petition, specification and description to be filed. The act of 1793, ch. 156, requires all these, and then grants a patent for invention or discovery; whereas, this grant is for that, and for improvements in the art, and in the several machines. It is a remedial act, and should receive a liberal construction, to effectuate the intentions of the legislature. *Whittemore* v. *Cutter*, 1 Gallis. 430. The patent is as broad as the law, if the grant be governed by the recital. Its construction is to be against the grantor, and according to the intent; *nor is it to be avoided by subtle distinctions: if there are [*487
two interpretations, the sensible one is to be adopted. Jenk. Cent. 138; *Eystor* v. *Studd*, Plowd. 467; *United States* v. *Fisher*, 2 Cranch 386, 399.

The improved hopperboy of the plaintiff is the only new and useful discovery which was in evidence in the case; the court misconstrued the law in their charge in this respect, inasmuch as the true construction of it is, not that the patentee shall be the first and original discoverer of a patentable thing, but "the true inventor" of such a thing; that such a thing was truly discovered and patented, without knowledge of its prior use, or public employment or existence; more especially, where, as in the present instance, the controversy is not between conflicting patents, but between the true patentee of a new and useful patentable thing, and a person defending himself against an infringement, on the plea of its prior use by third persons, who had no patent, and whose discovery, even if proved, was of a thing never in use or public existence, but in total disuse. The stat. 21 Jac. I., ch. 3, § 6 (Anno. 1623), grants the monopoly "of the sole working or making of any manner of new manufactures, within this realm, to the true and first inventor and inventors of such manufactures, which others at the time of making such grant, shall not use," &c. It is contended, under our law, that the utility is to be ascertained as well as the originality; and that this, as well as that, is partly a question for the jury. The thing patentable must be useful, as well as new. The useful thing patented prevails over one, not useful nor patented, though in *previous partial existence. This is not the case of conflicting [*488
patentees; and to destroy this patent, the previous use must appear, there being no pretence of description in a public work. The title of the act is "for the promotion of the useful arts." The first section speaks of "any

new and useful arts," not known or used, &c. The sixth, of that which "had been in use, or described in some public work, anterior to the supposed discovery." What degree of use does the law exact? A use known or described in a public work. Not merely an experimental, or essaying; nor a clandestine, nor obscure use. It must be useful, and in use, perhaps in known, if not public use; something equivalent to filing a specification on record. Now, here, utility was lost sight of in search of novelty. It seemed to be taken for granted, that proving the pre-existence of an unpatented hopperboy, defeated the plaintiff's patent. The desuetude of the rival hopperboy from inutility was established. The question was between a new and useful patented machine, and a useless and obsolete one, never patented; and which, not being useful, never could be patented. But that the patentee's is useful, nobody questions. At all events, the question of fact, whether in use, should have been left to the jury. The jury are substituted for the board, which, under the first law, was to decide whether the supposed invention was "sufficiently useful and important" for a patent. The court below suppose Stauffer to have given his discovery to the public. But it fell into disuse; there was nothing to give. Stauffer did not know its value; if he *had abandoned a field, with unknown treasure in the ground, could be afterwards claim the treasure? Grotius, *de Jure Belli ac Pacis*, lib. 3, ch. 20, § 28.

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5. The defendant's testimony of the use of hopperboys in mills, not specified in his notice, was erroneously admitted. The object of the provision in the 6th section of the patent law of 1793, ch. 156, was to simplify the proceedings, and to enable the defendant to give in evidence, under his notice, what he would otherwise be obliged to plead specially. The sufficiency of the notice is, therefore, to be tested by the rules of special pleading; which, though technical, are founded in good sense and natural justice, and are intended to put the adverse party on his guard as to what the other intends to rely upon in his defence. But such a notice as this could not answer that purpose.

6. The plaintiff's testimony of the payment for licenses to use his improved hopperboy, ought not to have been rejected. It ought to have been admitted, as circumstantial evidence entitled to some weight.

Hopkinson and *Sergeant*, contrà.—1. The admissibility of evidence of the use of the hopperboy, anterior to the plaintiff's alleged invention, in mills not specifically mentioned in the notice, depends upon the construction that may be given to the 6th section of the act of the 21st of February 1793, ch. 156, taken in connection with the notice. This section is substituted for the 6th section of the act of the 10th of April 1790, ch. 34. The office of the section, *in each of these acts, is two-fold: 1st. To state what shall constitute a defence: 2. To state the manner in which the defendant may avail himself of it. And whatever difficulties may exist (if any there be) in the construction of the section, arise from the combination of this two-fold object. That this was the object of the section, is perfectly obvious. The general issue would be a denial of the allegation contemplated by the 5th section of the act of 1793, and the 4th of the act of 1790. If the acts had stopped there, it is manifest, that the defendant could have had no defence, but what was legally within the scope of the general issue.

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The 10th section would not have availed him, because, the limitation of time, and the grounds for repealing a patent upon a *scire facias*, are totally different from those which ought to constitute a defence to the action. The patent may be opposed, in an action, upon the ground, that the patentee is not the original inventor; but it can be repealed only upon the ground, that he is not the true inventor. Fraud (proof that it was surreptitiously obtained) is the necessary basis in the one case; but error and mistake is equally available in the other. Neither could the defendant avail himself of the provisions in the prior part of the act: for these are merely directory, and they terminate in the provision made by the 5th section, which would have been conclusive; the 6th section is, therefore, a proviso to the 5th. The 6th section of the act of 1790, made the patent *primâ facie* evidence only, which would have opened the inquiry as to the truth of the invention. It appears, then, that the object of the proviso was, in the first place, *to settle what should constitute a defence. These matters would not have been within the scope of the general issue, by the [*491 rules of pleading; they would have presented the subject of a special plea in bar. The act, therefore, at the same time provides, that they may be given in evidence under the general issue. The design, in this respect, was to save the necessity of special pleading, on the one hand, and on the other, to give a reasonable notice. Does the law require the evidence to be set out? No; and yet, if surprise is to be fully guarded against, this ought certainly to be stated, in order that the plaintiff may prove that it is false, or proceeds from corrupt witnesses, &c. Is it then necessary, that all the particulars should be given, the state, county, township, town, street, square, number of the house? The law does not require it. What certainty, then, is required in the notice? The answer is obtained, by ascertaining the use and intention of the section, which were to save the necessity of special pleading. What then must be alleged in a special plea? Not the evidence or facts, but the matter of defence, which may be, that the plaintiff was not the true inventor, but that the invention was before his supposed discovery. You must state what is the ground and essence of the defence, and nothing more; all else is surplusage: *e. g.*, that the plaintiff was not the true inventor of the hopperboy, but the same was in use, prior to his supposed discovery, at the mill of A. Now, its being in use at the mill of A. is not of the essence of the defence, for it is as good, if used at the mill of B.: the essence is, that it was used before. The defendant *then would be entitled to [*492 lay the place under a *videlicet*, and of course, would not be obliged to prove it, but might prove any other. If, then, the law did not mean to increase the difficulty of the defendant, the same may be done in a notice. Consider the inconveniences of a contrary practice. A machine has been used in a foreign country: the country, town and place may be unknown. Shall I, therefore, be deprived of my invention? Again, it is known. I am bound to give thirty days' notice, before trial, and no more: *cui bono*, that I should mention a town or place in England? The intention is, that the plaintiff shall come prepared to prove where his invention was made, and not to disprove the defendant's evidence; that he shall have notice of the kind of defence intended, in order that he may shape his case accordingly. If notice is given, that the defendant will give in evidence, that the plaintiff's machine was used before his supposed discovery; this is notice of

special matter, tending to prove that it was not invented by him. The law does not require a statement or description of the special matter, but notice that special matter will be given in evidence, tending to prove certain facts. There is no reciprocity in the contrary rule. The declaration is general; it does not specify the date of the invention, the place of the invention, nor the evidence or facts by which the originality and truth of the invention are to be proved. Yet these are all extremely important to the defendant, to enable him to prepare his defence. As to the breach, it is equally general; it does not state the time, except as a mere matter of form, by which *the plaintiff is not bound. It does not state the place, except by the very liberal description necessary for the venue, but which is not at all binding. And finally, the rule contended for is impracticable, consistently with the purposes of justice; for it may, without any fault of the defendant, deprive him of the benefit of a perfectly good defence, upon a mere requisition of form, which he cannot possibly comply with. The notice states the use of the hopperboy, at a number of mills, specially described by the state, county and name of the proprietor, "and at sundry other places in the said state of Pennsylvania, the state of Maryland, and elsewhere in the United States." It is not alleged, nor could it be, that the defendant had the knowledge that would have enabled him to extend the specification. Nor is it alleged, that he could have acquired the knowledge, by any exertion he might have made; on the contrary, the course he has taken is indicative of perfectly fair intention. The exception is, that the defendant was permitted to give evidence, that the hopperboy "had been used at sundry other mills in Pennsylvania," precisely in the words of the notice. To sustain this exception, then, the court must decide, that this cannot in any case be done. But if it cannot be shown, that in a single supposable case, this would work injustice, and defeat the law, it is sufficient. Now, it is very clear, that in many cases, this may be precisely the state of the party's knowledge, and all he can obtain, and it may be precisely the state of the evidence. Suppose, a witness should know that hopperboys were used in sundry mills, but not their precise local *situation, name of owner, &c. Or suppose, he should have seen a hopperboy that bore the most evident marks of having been used in a mill or mills. The effect of such evidence is quite another question; its competency and relevancy are for the court; its credibility, and the inferences of fact that are to be made from it, are for the jury. The same supposition would apply to its having been described in a public work. Is it necessary to give the title of the book, name of the author, and number of the edition? This may be impracticable. The defendant may have a witness who has seen the thing in use in a foreign country, and not be able to give a single particular; or who has seen it described in a foreign work, of which he can give no further account. Such evidence, if credited, would be entirely conclusive; and yet he could have no benefit of it, because he had not done what was impossible. But even if the witness knows all these particulars, the defendant has no means of compelling him to disclose them before the trial. The rules of pleading aim to establish a convenient certainty on the record, by giving the party notice of what is alleged, and furnishing evidence of what has been decided. In many instances, they fall short of this, their avowed design; in none, do they go beyond it. For the purpose of preventing surprise, they are wholly

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ineffectual; they give no notice of particular facts, of evidence, of witnesses. The corrective of the evil, if evil there be, is to be found in the exercise of the general superintending authority of the court, applied to cases where there may really be surprise or fraud. So, in this case, if there really had been surprise *(fraud is out of the question), the court had the power [*495 to grant a new trial. This power is an amply sufficient corrective; and its existence affords a decisive answer to the argument drawn from the possible injustice that may be done.

2. The exception to the refusal to admit evidence of the payment for the use of licenses, will be easily disposed of. The fact to be established on the one side, and disproved on the other, was that the hopperboy was in use, before the alleged invention or discovery of Evans. The evidence offered had no bearing whatever upon the question of fact. If believed, it went no further than to show, that those who had paid, thought it best to pay; a decision that might be equally prudent, whether the fact was, or was not, as alleged. Such testimony would be more objectionable than the opinion of the witness; for it would be only presumptive proof of opinion, without the possibility of examining its grounds. As opinion, it would be inadmissible; as evidence of opinion, it would be still more objectionable.

3. The plaintiff's patent can only be considered in one of three points of view. 1st. As a patent for the improvement in the art of manufacturing flour; that is, for the combination. 2d. As a patent for the combination, and also for the several machines; that is, a joint and several patent. 3d. As a patent simply for the several machines. It is very clear, that the patent itself is for the combination only; though it is equally clear, that by the terms of the law, he might have obtained a patent for the whole, and also for the several parts. That this is the necessary construction *of [*496 the patent, is plain, from the patent itself, taken in connection with the act of the 21st of January 1808, ch. 117. The act authorizes a patent to be issued for his improvements in the art of manufacturing flour, and in the several machines, &c. The matters are plainly different. They are the subject of distinct patents, to be obtained in the "manner and form" prescribed by the act of 1793, ch. 156. The object of the special act was, to put Evans upon the same footing as if his former patent had not been issued; but it did not mean to dispense with any of the requisites of the general law. With the general requisite (that he was inventor) it could not dispense; the constitution did not permit it. By the general law, improvement in an art, and improvement in a machine, are distinct patentable objects. This patent is only for the improvement in the art of manufacturing flour, and the recital of the special act, and the words "which" and "said" do not at all help it. It is true, it is an improvement operated by means of the machines, but not exclusively. The result may be secured, without securing the means. This patent was granted to the plaintiff; was received by him; and must be presumed to be according to his application and his oath. The oath is, that he is the true inventor of the "improvements above specified;" which term is applied in the specification, as in the patent, only to the art. But it is said, the specification is a part of the patent, and limits or enlarges it, as the case may be. Mr. Justice STORY, in the case which has been cited, only says, that the specification *may control the generality of the patent. [*497 *Whittemore* v. *Cutter*, 1 Gallis. 437. But the specification, in the case

now before the court, does not claim the machines. If the patent was for a combination, the plaintiff's action was gone; he could not maintain it against a person using one of the machines. If the patent was for the combination, and also for the several machines, that is, a joint and several patent, then the patentee might proceed upon it, as the one or the other, according to the nature of the alleged invasion. If he proceeded upon it, for a breach of the right to the combination, he must show the originality of invention, and might be defeated by opposite proof. If for a breach of the right to any one of the machines, he might be defeated, by showing that he was not the original inventor of the machine. So, if it be considered a several patent, that is, as if he had five distinct patents. But in no conceivable case, can he stand upon any but one of these three grounds, nor claim to have the benefit of a larger, or even of a different patent.

4. From this analysis, which in necessary to prevent confusion, we come to inquire into the nature of the case presented to the court for decision, and to which the charge was to be applied; premising, 1st. That no exception can be taken to what the court did not give in charge to the jury; and 2d. That no exception can be taken to an opinion, however erroneous, that had no bearing upon the issue to be decided by the jury. It is apparent from the record, that the action of the plaintiff was founded upon the alleged
*498] *use, by the defendant, of a machine called a hopperboy, of which the plaintiff claimed to be the inventor; that the evidence on both sides applied to this allegation, and to this alone; the plaintiff claiming to be the inventor, and the defendant denying it. The charge of the court noticed the several arguments that had been used at the bar, and examined the general question as to the character of the patent; upon which, however, as it had not been discussed, no opinion was given. This is clear; for if an opinion had been expressed, it must have been, that the action was not maintainable. Nothing short of that would have been material. But the court left the case to the jury, as of an action that was maintainable, and instructed them as to the principles by which it was to be decided; which negatives the conclusion of any opinion having been given, that the action was not maintainable. If the defendant had required the court to charge, that the action was not maintainable, and they had charged that it was, or declined to charge at all, he would have had ground of exception. But the plaintiff cannot complain, because he has what is equivalent to a decision in his favor.

5. The statute of James (21 Jac. I., c. 3) A. D. 1623, confined monopolies to the first and true inventors of manufactures not known or used before. One hundred and seventy years had elapsed when our act passed; commerce and the arts had made such advances, such facilities had been created for the diffusion of knowledge, that everything known by use, or described in books, might be considered as common property. It would have been
*499] strange, to adopt a different *principle. The act of congress does not. It is a mistake to suppose, there is in this respect any difference between the act of congress and the act of parliament. One says "useful" inventions, the other "new and useful;" but both have the expressions "not used or known before." A patent can only be had, upon an allegation that the applicant has invented something new and useful. Its novelty may certainly be questioned; perhaps, its usefulness. But where the defence is, that the

thing was known or used before, is it necessary to prove the usefulness of the thing so known or used? The act does not require it; nor is there any good reason why the patentee should be permitted to controvert it.

Harper, in reply, insisted—1. That the court below had erred in admitting testimony of the use of the plaintiff's machine, in mills not specified in the notice. The statute was not framed with a view to the benefit of the defendant alone. The notice to be given is not that vague, indistinct, general notice, which is set up on the other side. It must be an effectual, useful notice; such a notice as may put the patentee on his guard, and enable him to see what are the precise ground of defence. It must be more specific than a mere transcript of the particular class of grounds of defence, such as suppression of parts, redundancy, &c. The circumstances of the time, the place, when and where used, and by what persons, are essentially necessary, in order to enable the patentee to meet the defence. The burden of proof, is, in effect, thrown upon the patentee; and the law *intended that he should meet it fairly. Such a notice as that given in this case would not be good, if put into the form of a special plea. The degree of certainty required in a plea, in the statement of the time and place, when and where material facts have happened, is one of the most difficult questions of the law; but these circumstances must always be laid, and must be proved as laid, whenever it is essential to enable the other party to maintain his case. There is a distinction between the matter of defence, and the evidence by which it is to be maintained. A notice of the particulars of the evidence is not required, but of the time and place where the former use of the machine in question occurred. Nor is this unreasonable; for it is highly improbable, that anybody would be able to testify as to the minute particulars of an invention, without being able to remember in what work he had seen it described, or to state in what place and at what time he had seen it used. [*500

2. The special act for the plaintiff's relief is a distinct, substantive, independent grant, declaring the plaintiff to be the original inventor, and, as such, entitled to a patent. It contains no reference to the general patent law, nor does it reserve any right in others to contest the originality of his invention. The defendant, therefore, cannot say, that the plaintiff is not the inventor, though he may deny that he has violated the plaintiff's rights as inventor. Congress is not confined by the constitution to any particular mode of determining the fact, who are inventors or authors. It is true, a patent or copyright can only be granted to an inventor or author; but the originality of the invention *or authorship may be determined by congress itself, upon such testimony as it deems sufficient; or by an administrative act, by the decision of some board or executive officer; or, lastly, by a judicial investigation; according as the legislative will may prescribe either of these several modes. The act of parliament, 15 Geo. III., for the relief of Watt and Boulton, the inventors of the improved steam-engine, and extending the term of their patent for twenty-five years, contained an express provision, that every objection in law competent against the patent, should be competent against the act, "to all intents and purposes, except so far as relates to the term thereby granted." *Hornblower* v. *Boulton*, 8 T. R. 95, 97. The act of congress for the relief of Oliver Evans contains no such provision The conclusion, therefore, is, that the legislature meant to quiet [*501

him in his claim, after he had so long enjoyed it, and in consideration of his peculiar merits, and of his former patent having been vacated for informality.

3. The court, below, instructed the jury, that the patent was not for any one machine, but for the combined effect of the whole; though they concluded, by leaving it upon the prior use, still, the intimation that the action could not be maintained, even though the prior use was not proved, did not leave the fact to the jury, free from bias. Though not a positive direction to the jury, to find for the defendant, it had the effect of a nonsuit. The wishes of the grantee, and the intention of the grantor, both extended, as
*502] well to a patent for the several machines, *as to a patent of the combined effect of the whole. The word "improvement," though in the singular number, extends not only to the plaintiff's improvement in the art of manufacturing flour, but to his improvement in the several machines by means of which the operations of the art are conducted. This was a patent for an improvement on the particular machine in question, and not for its original invention. In this respect it is like that of Watt and Boulton for their improvement on the steam-engine.

4. The prior use, which is to defeat a patent, ought to be a public use. The defence here set up, under the 6th section of the patent law of 1793, ch. 156, was, that the patentee was not the original discoverer, and that the thing had been in use, &c. But how else could it be shown that he was not the discoverer, but by showing that it had before been in public use? A mere secret, furtive use would not disprove the fact of his being the original discoverer. If this were so, then the art of printing and gun-powder were not invented in Europe, because they had been before used in a sequestered corner of the globe, like China. But there is a distinction between a first discovery and an original discovery. The art of printing was originally discovered in Germany, though it was first invented in China. So, the plaintiff would not cease to be the original inventor of the hopperboy, even if it had been proved, that another similar machine had been before privately used in a single mill. It ought, therefore, to have been left to the jury, to find for the plaintiff, if they believed that the use was a secret use.

*503] *March 7th, 1818. MARSHALL, Ch. J., delivered the opinion of the court.—In this case, exceptions were taken in the circuit court, by the counsel for the plaintiff in error, 1st. To the opinion of the court, in admitting testimony offered by the defendant in that court. 2d. To its opinion in rejecting testimony offered by the plaintiff in that court. 3d. To the charge delivered by the judge to the jury.

Under the 6th section of the act for the promotion of useful arts, and to repeal the act heretofore made for that purpose, the defendant pleaded the general issue, and gave notice that he would prove at the trial, that the improved hopperboy, for the use of which, without license, this suit was instituted, had been used previous to the alleged invention of the said Evans, in several places (which were specified in the notice), or in some of them, "and also at sundry other places in Pennsylvania, Maryland, and elsewhere in the United States." Having given evidence as to some of the places specified in the notice, the defendant offered evidence as to some other places

not specified. This evidence was objected to by the plaintiff, but admitted by the court; to which admission, the plaintiff's counsel excepted.

The 6th section of the act appears to be drawn, on the idea, that the defendant would be not at liberty to contest the validity of the patent on the general issue. It, therefore, intends to relieve the defendant from the difficulties of pleading, when it allows him to give in *evidence matter which does affect the patent. But the notice is directed for the security of the plaintiff, and to protect him against that surprise to which he might be exposed, from an unfair use of this privilege. Reasoning merely on the words directing this notice, it might be difficult to define, with absolute precision, what it ought to be include, and what it might omit. There are, however, circumstances in the act which may have some influence on this point. It has been already observed, that the notice is substituted for a special plea; it is further to be observed, that it is a substitute to which the defendant is not obliged to resort. The notice is to be given only when it is intended to offer the special matter in evidence on the general issue. The defendant is not obliged to pursue this course, he may still plead specially, and then the plea is the only notice which the plaintiff can claim.[1] If, then, the defendant may give in evidence, on a special plea, the prior use of the machine, at places not specified in his plea, it would seem to follow, that he may give in evidence its use, at places not specified in his notice. It is not believed, that a plea would be defective, which did not state the mills in which the machinery alleged to be previously used was placed. [*504

But there is still another view of this subject, which deserves to be considered. The section which directs this notice, also directs, that if the special matter stated in the section be proved, "judgment shall be rendered for the defendant, with costs, and the patent shall be declared void." The notice might be intended, not only for the information of the plaintiff, *but for the purpose of spreading on the record the cause for which the patent was avoided. This object is accomplished by a notice which specifies the particular matter to be proved. The ordinary powers of the court are sufficient to prevent, and will, undoubtedly, be so exercised, as to prevent the patentee from being injured by the surprise. [*505

This testimony having been admitted, the plaintiff offered to prove that the persons, of whose prior use of the improved hopperboy the defendant had given testimony, had paid the plaintiff for licenses to use his improved hopperboy in their mills, since his patent. This testimony was rejected by the court, on the motion of the defendant, and to this opinion of the court, also, the plaintiff excepted. The testimony offered by the plaintiff was entitled to very little weight, but ought not to have been absolutely rejected. Connected with other testimony, and under some circumstances, even the opinion of a party may be worth something. It is, therefore, in such a case as this, deemed more safe to permit it to go to the jury, subject, as all testimony is, to the animadversion of the court, than entirely to exclude it.

We come next to consider the charge delivered to the jury. The errors alleged in this charge may be considered under two heads: 1st. In construing the patent to be solely for the general result produced by the com-

[1] Grant v. Raymond, 6 Pet. 246; Day v. New England Car-Spring Co., 3 Bl. C. C. 179; Latta v. Shawk, 1 Bond 259; Phillips v. Comstock, 4 McLean 525.

bination of all the machinery, and not for the several improved machines, as well as for the general result. 2d. That the jury must find for the defend-
*506] ant, if they *should be of opinion, that the hopperboy was in use prior to the invention of the improvement thereon by Oliver Evans.

The construction of the patent must certainly depend on the words of the instrument. But where, as in this case, the words are ambiguous, there may be circumstances which ought to have great influence in expounding them. The intention of the parties, if that intention can be collected from sources which the principles of law permit us to explore, are entitled to great consideration. But before we proceed to this investigation, it may not be improper to notice the extent of the authority under which this grant was issued. The authority of the executive to make this grant, is derived from the general patent law, and from the act for the relief of Oliver Evans. On the general patent law alone, a doubt might well arise, whether improvements on different machines could regularly be comprehended in the same patent, so as to give a right to the exclusive use of the several machines, separately, as well as a right to the exclusive use of those machines in combination. And if such a patent would be irregular, it would certainly furnish an argument of no inconsiderable weight against the construction. But the "act for the relief of Oliver Evans" entirely removes this doubt. That act authorizes the secretary of state to issue a patent, granting to the said Oliver Evans the full and exclusive right, in his invention, discovery and improvements in the art of manufacturing flour, and in the several
*507] machines *which he has invented, discovered, improved and applied to that purpose. Of the authority, then, to make this patent co-extensive with the construction for which the plaintiff's counsel contends, there can be no doubt.

The next object of inquiry is, the intention of the parties, so far as it may be collected from sources to which it is allowable to resort. The parties are the government, acting by its agents, and Oliver Evans. The intention of the government may be collected from the "act for the relief of Oliver Evans." That act not only confers the authority to issue the grant, but expresses the intention of the legislature respecting its extent. It may fairly be inferred from it, that the legislature intended the patent to include both the general result, and the particular improved machines, if such should be the wish of the applicant. That the executive officer intended to make the patent co-extensive with the application of Oliver Evans, and with the special act, is to be inferred, from the reference to both in the patent itself. If, therefore, it shall be satisfactorily shown from his application, to have been the intention of Oliver Evans to obtain a patent including both objects, that must be presumed to have been also the intention of the grantor.

The first evidence of the intention of Oliver Evans is furnished by the act for his relief. The fair presumption is, that it conforms to his wishes; at least, that it does not transcend them. The second, is his petition to the
*508] secretary of state, *which speaks of his having discovered certain useful improvements, and prays a patent for them, "agreeably to the act of congress, entitled, an act for the relief of Oliver Evans." This application is for a patent co-extensive with the act. This intention is further manifested by his specification. It is not to be denied, that a part of this specification would indicate an intention to consider the combined operation

of all his machinery as a single improvement, for which he solicited a patent. But the whole, taken together, will not admit of this exposition. The several machines are described with that distinctness which would be used by a person intending to obtain a patent for each. In his number 4, which contains the specification of the drill, he asserts his claim, in terms, to the principles, and to all the machines he had specified, and adds, "they may all be united and combined in one flour-mill, to produce my improvement in the art of manufacturing flour complete, or they may be used separately for any of the purposes specified and allotted to them, or to produce my improvement in part, according to the circumstances of the case."

Being entitled by law to a patent for all and each of his discoveries; considering himself, as he avers in his specification and affirmation, as the inventor of each of these improvements; understanding, as he declares he did, that they might be used together so as to produce his improvement complete, or separately, so as to produce it in part; nothing can be more improbable, than that Oliver Evans intended to obtain a patent solely for their combined operation. His affirmation, *which is annexed to his specification, confirms this reasoning. To the declaration that he is [*509 the inventor of these improvements, he adds, "for which he solicits a patent." With this conviction of the intention with which it was framed, the instrument is to be examined.

The patent begins with a recital, that Oliver Evans had alleged himself to be the inventor of a new and useful improvement in the art of manufacturing flour, &c., by the means of several machines, for a description of which reference is made to his specification. It will not be denied, that if the allegation of Oliver Evans was necessarily to be understood as conforming to this recital, if our knowledge of it was to be derived entirely from this source, the fair construction would be, that his application was singly for the exclusive right to that improvement which was produced by the cambined operation of his machinery. But in construing these terms, the court is not confined to their most obvious import. The allegation made by Oliver Evans, and here intended to be recited, is in his petition to the secretary of state. That petition is embodied in, and becomes a part of the patent; it explains itself, and controls the words of reference to it. His allegation is not "that he has invented a new and useful improvement," but that he has discovered certain useful improvements. The words used by the department of state in reciting this allegation, must then be expounded by the allegation itself, which is made a part of the patent. The recital proceeds, "which improvement has not been known," &c. These words refer clearly to *the improvement first mentioned and alleged in the petition of Oliver Evans, and are, of course, to be controlled in like [*510 manner with the antecedent words, by that petition. This part of the recital is concluded by adding, that Oliver Evans has affirmed, that he does verily believe himself to be the true inventor or discoverer of the said improvement. But the affirmation of Oliver Evans, like his petition, is embodied in the grant, and must, of course, expound the recital of it. That affirmation is, that he does verily believe himself to be the true and original inventor of the improvements contained in his specification. In every instance, then, in which the word improvement is used in the singular number, throughout the part of the recital of this patent, it is used in reference to a

paper contained in the body of the patent, which corrects the term, and shows it to be inaccurate.

The patent, still, by way of recital, proceeds to add, "and agreeably to the act of congress, entitled 'an act for the relief of Oliver Evans,' which authorizes the secretary of state to secure to him, by patent, the exclusive right to the use of such improvement in the art of manufacturing flour and meal, and in the several machines which he has discovered, improved and applied to that purpose; he has paid into the treasury, &c., and presented a petition to the secretary of state, signifying a desire of obtaining an exclusive property in the said improvement, and praying that a patent may be granted for that purpose."

*511] *To what do the words "said improvement" relate? The answer which has been given at the bar is entirely correct. To the improvement mentioned in the statute and in the petition, to both of which direct reference is made. But in the statute, and in the petition, the word used is "improvements," in the plural. The patent, therefore, obviously affixed to the word improvement, in the singular, the same sense in which the plural is employed, both in the statute and in the petition. We are compelled, from the whole context, so to construe the word, in every place in which it is used in the recital, because it is constantly employed with express reference to the act of congress, or to some document embodied in the patent, in each of which the plural is used. When, then the words "said improvement" are used as a term of grant, they refer to the words of the recital, which have been already noticed, and must be construed in the same sense. This construction is rendered the more necessary, by the subsequent words, which refer for a description of the improvement to the schedule. It also derives some weight from the words, "according to law," which are annexed to the words of grant. These words can refer only to the general patent law, and to the "act for the relief of Oliver Evans." These acts, taken together, seem to require that the patent should conform to the specification, affirmation and petition of the applicant.

It would seem as if the claim of Oliver Evans was rested, at the circuit court, on the principle, that a grant for an improvement, by the combined

*512] operation *of all the machinery, necessarily included a right to the distinct operation of each part, inasmuch as the whole comprehends all its parts. After very properly rejecting this idea, the judge appears to have considered the department of state, and the patentee, as having proceeded upon it, in making out this patent. He supposed the intention to be, to convey the exclusive right in the parts as well as in the whole, by a grant of the whole; but as the means used are, in law, incompetent to produce the effect, he construed the grant according to his opinion of its legal operation. There is great reason in this view of the case, and this court has not discarded it, without hesitation. But as the grant, with the various documents which form a part of it, would be contradictory to itself; as these apparent contradictions are all reconciled by considering the word "improvement" to be in the plural instead of the singular number; as it is apparent, that this construction gives to the grant its full effect, and that the opposite construction would essentially defeat it, this court has, after much consideration and doubt, determined to adopt it, as the sound exposition of the instrument.

The second error alleged in the charge, is, in directing the jury to find for the defendant, if they should be of opinion, that the hopperboy was in use, prior to the improvement alleged to be made thereon by Oliver Evans. This part of the charge seems to be founded on the opinion, that if the patent is to be considered as a grant of the exclusive use of distinct improvements, *it is a grant for the hopperboy itself, and not for an improvement on the hopperboy. The counsel for the plaintiff contends, that [*513 this part of the charge is erroneous, because, by the "act for the relief of Oliver Evans," congress has itself decided, that he is the inventor of the machines for which he solicited a patent, and has not left that point open to judicial inquiry. This court is not of that opinion. Without inquiring whether congress, in the exercise of its power "to secure for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries," may decide the fact, that an individual is an author or inventor, the court can never presume congress to have decided that question in a general act, the words of which do not render such a construction unavoidable. The words of this act do not require this construction. They do not grant to Oliver Evans the exclusive right to use certain specified machines; but the exclusive right to use his invention, discovery and improvements; leaving the question of invention and improvement open to investigation, under the general patent law.

The plaintiff has also contended, that it is not necessary for the patentee to show himself to be the first inventor or discoverer. That the law is satisfied, by his having invented a machine, although it may have been previously discovered by some other person. Without a critical inquiry into the accuracy with which the term invention or discovery may be applied to any other than the first inventor, the court *considers this question as [*514 completely decided by the 6th section of the general patent act. That declares, that if the thing was not originally discovered by the patentee, but had been in use, or had been described in some public work, anterior to the supposed discovery of the patentee, judgment shall be rendered for the defendant, and the patent declared void. Admitting the words "originally discovered," to be explained or limited by the subsequent words, still, if the thing had been in use, or had been described in a public work, anterior to the supposed discovery, the patent is void. It may be, that the patentee had no knowledge of this previous use or previous description; still, his patent is void: the law supposes he may have known it; and the charge of the judge, which must be taken as applicable to the testimony, goes no further than the law.

The real inquiry is, does the patent of Oliver Evans comprehend more than he has discovered? If it is for the whole hopperboy, the jury has found that this machine was in previous use. If it embraces only his improvement, then the verdict must be set aside. The difficulties which embarrass this inquiry are not less than those which were involved in the first point. Ambiguities are still to be explained, and contradictions to be reconciled. The patent itself, construed without reference to the schedule other documents to which it refers, and which are incorporated in it, would be a grant of a single improvement; but construed with those *docu- [*515 ments, it has been determined to be a grant of the several improvements which he has made in the machines enumerated in his specification.

But the grant is confined to improvements. There is no expression in it which extends to the whole of any one of the machines which are enumerated in his specification or petition. The difficulty grows out of the complexity and ambiguity of the specification and petition. His schedule states his first principle to be the operation of his machinery on the meal, from its being ground until it is bolted. He adds, "this principle I apply by various machines, which I have invented, constructed and adapted to the purposes hereafter specified."

His second principle is the application of the power that moves the mill to his machinery. The application of these principles, he says, to manufacturing flour, is what he claims as his invention or improvement in the art. He asserts himself to be the inventor of the machines, and claims the application of these principles, to the improvement of the process of manufacturing flour, and other purposes, as his invention and improvement in the art. The schedule next proceeds to describe the different machines as improved, so as to include in the description the whole machine, without distinguishing his improvement from the machine as it existed previous thereto; and in his fourth number, he says, "I claim the exclusive right to the principles, and to all the machines above specified, and for all the uses and purposes specified, as not having been heretofore known or used, before I discovered them.

*516] *If the opinion of the court were to be formed on the schedule alone, it would be difficult to deny that the application of Oliver Evans extended to all the machines it describes. But the schedule is to be considered in connection with the other documents incorporated in the patent. The affirmation which is annexed to it avers, that he is the inventor, not of the machines, but of the improvements herein above specified. In his petition, he states himself to have discovered certain useful improvements, applicable to the art of manufacturing flour, and prays a patent for the same; that is, for his improvements, agreeable to the act of congress, entitled, "an act for the relief of Oliver Evans." After stating the principles as in his schedule, he adds, "the machinery consists of an improved elevator, an improved conveyor, an improved hopperboy, an improved drill, and an improved kiln-drier." Although, in his specification, he claims a right to the whole machine, in his petition, he only asks a patent for the improvements in the machine. The distinction between a machine, and an improvement on a machine, or an improved machine, is too clear, for them to be confounded with each other.

The act of congress, agreeable to which Evans petitions for a patent, authorizes the secretary of state to issue one, for his improvements in the art of manufacturing flour, "and in the several machines which he has

*517] invented, discovered, improved and applied to that purpose." *In conformity with this act, this schedule, and this petition, the secretary of state issues his patent, which, in its terms, embraces only improvements. Taking the whole together, the court is of opinion, that the patent is to be constructed as a grant of the general result of the whole machinery, and of the improvement in each machine. Great doubt existed, whether the words of the grant, which are expressed to be for an improvement or improvements only, should be understood as purporting to be a patent only for improvements; or should be so far controlled by the specification and

petition, as to be considered as a grant for the machine as improved, or in the words of the schedule and petition, for "an improved elevator, an improved conveyor, an improved hopperboy, an improved drill, and an improved kiln-drier." The majority of the court came at length to the opinion, that there is no substantial difference, as they are used in this grant, whether the words grant a patent for an improvement on a machine, or a patent for an improved machine; since the machine itself, without the improvement, would not be an improved machine. Although I did not concur in this opinion, I can perceive no inconvenience from the construction.

It is, then, the opinion of this court, that Oliver Evans may claim, under his patent, the exclusive use of his inventions and improvements in the art of manufacturing flour and meal, and in the several machines which he has invented, and in his improvements on machines previously discovered. [*518 *In all cases where his claim is for an improvement on a machine, it will be incumbent on him to show the extent of his improvement, so that a person understanding the subject may comprehend distinctly in what it consists.

Some doubts have been entertained, respecting the jurisdiction of the courts of the United States, as both the plaintiff and defendant are citizens of the same state. The 5th section of the act to promote the progress of useful arts, which gives to every patentee a right to sue in a circuit court of the United States, in case his rights be violated, is repealed by the 3d section of the act of 1800, ch. 179, which gives the action in the circuit court of the United States, where a patent is granted "pursuant" to that act, or to the act for the promotion of useful arts. This patent, it has been said, is granted, not in pursuance of either of those acts, but in pursuance of the act "for the relief of Oliver Evans." But this court is of opinion, that the act for the relief of Oliver Evans is engrafted on the general act for the promotion of useful arts, and that the patent is issued in pursuance of both. The jurisdiction of the court is, therefore sustained.

As the charge delivered in the circuit court to the jury differs in some respects from this opinion, the judgment rendered in that court is reversed and annulled, and the cause remanded to the circuit court, with directions to award a *venire facias de novo*, and to proceed therein according to law.

Judgment reversed.

*JUDGMENT.—This cause came on to be heard, on the transcript of [*519 the record of the circuit court for the district of Pennsylvania, and was argued by counsel, on consideration whereof, this court is of opinion, that there is error in the proceedings of the said circuit court, in this, that the said court rejected testimony which ought to have been admitted; and also in this, that, in the charge delivered to the jury, the opinion is expressed, that the patent, on which this suit was instituted, conveyed to Oliver Evans only an exclusive right to his improvement in manufacturing flour and meal, produced by the general combination of all his machinery, and not to his improvement in the several machines applied to that purpose; and also, that the said Oliver Evans was not entitled to recover, if the hopperboy, in his declaration mentioned, had been in use previous to his alleged discovery. Therefore, it is considered by this court, that the judgment of the circuit

court be reversed and annulled, and that the cause be rendered to the said circuit court, with directions to award a *venire facias de novo.*(a)[1]

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*520] *LENOX *et al. v.* PROUT.

Indorsement.—Answer in chancery.

The indorser of a promissory note, who has been charged by due notice of the default of the maker, is not entitled to the protection of a court of equity, as a surety; the holder may proceed against either party, at his pleasure, and does not discharge the indorser, by not issuing, or by countermanding, an execution against the maker.[2]

By the statute of Maryland, of 1763, ch. 23, § 8, which is, perhaps, only declaratory of the common law, an indorser has a right to pay the amount of the note or bill to the holder, and to be subrogated to all his rights, by obtaining an assignment of the holder's judgment against the maker.

The answer of a defendant in chancery, though he may be interested to the whole amount in controversy, is conclusive evidence, if uncontradicted by the testimony of any witness in the cause.[3]

Appeal from a decree of the Circuit Court for the district of Columbia. The facts of this case were as follows: William Prout, the plaintiff in the court below, on the 29th of July 1812, indorsed, without any consideration, a promissory note made by Lewis Deblois, in his favor, for $4400, payable in thirty days after date. This note was discounted by the defendants, as trustees for the late bank of the United States, for the accommodation and use of the maker, and not being paid, an action was brought against him, and another against the indorser, in the name of the trustees, and judgment rendered therein, in the same circuit court, in the term of December 1813.

*521] In the April following, Prout, fearful of Deblois' *failure, called on the defendant Davidson, who was agent of the other defendants, and requested him to issue a *fieri facias* on the judgment against Deblois, promising to show the marshal property on which to levy. On the 16th of April, or thereabouts, Davidson directed an execution of that kind to issue, and Prout, on being apprised thereof, offered to point out to the marshal property of the defendant, and to indemnify him for taking and selling the same. But before anything further was done, Davidson countermanded this execution, and on the 2d of May 1814, or thereabouts, a *ca. sa.* was issued against Deblois, by the clerk, through mistake, and without any order of Davidson or the other defendants. This was served on Deblois on the 10th of May, who afterwards took the benefit of the insolvent laws in force within the district of Columbia, the effect of which was, to divide all his property among his creditors, whose demands were very considerable. It appeared, from the evidence, probable, that if the *fieri facias* had been prosecuted to effect, a great part of the money due on the judgment against Deblois, which had been recovered on the note indorsed by Prout, would have been raised, and the latter, in that case, would have had to pay but a

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(a) See Appendix, Note II.

[1] For a further decision in this case, see 8 W. C. C. 443, affirmed in this court, 7 Wheat. 356.

[2] S. P. Sterling *v.* Marietta and Susquehanna Trading Co., 11 S. & R. 179; Beardsley *v.* Warner, 6 Wend. 610; s. c. 8 Id. 194; Ross *v.* Jones, 22 Wall. 576.

[3] Higbie *v.* Hopkins, 1 W. C. C. 230.

small sum on the one against him. But as matters stood, little or nothing was expected from the estate of Deblois; and of course, no part of the judgment against Prout could be satisfied in that way, but the whole still remained due and unpaid. The *fieri facias* appeared to have been countermanded *the day after it was received by the marshal, of which Prout had notice soon after. [*522

On these facts, the circuit court decreed, that the appellants should be perpetually enjoined from proceeding at law on the judgment which they had obtained against Prout, and that they should also pay him his costs of suit, to be taxed. From this decree, the defendants below appealed to this court.

March 6th. *Key*, for the appellants, argued, that this being a negotiable instrument, the liability of the plaintiff below, after notice of non-payment by the maker, was no longer conditional, and depending on the default of the maker; so that the holders of the note could proceed agains him alone, without taking any steps against the maker. That, therefore, they were not bound to issue the *fieri facias* against Deblois, on the application of the plaintiff. That having issued it, they had a right to countermand it, provided they did not place the plaintiff in a worse situation than he was in, before it was issued. That the *fi. fa.* was not countermanded, with any view to injure the plaintiff, but because the agent had ascertained that the trustees of the bank were not bound to issue the *fi. fa.*, in the first instance, and that it was neither right nor safe for the bank to give thereby a preference to the plaintiff over other indorsers of Deblois. And that the plaintiff was not placed in a worse situation by countermanding the *fi. fa.;* but had it in his power, under the act of assembly of Maryland, of 1763, ch. 23, to tender the amount of the note to the agent of the bank and obtain an assignment of the judgment, *by which he might have secured himself, by levying on the property still in the possession of Deblois. [*523

Jones and *Law*, for the respondent and plaintiff below, argued, that the plaintiff being a mere gratuitous surety, was entitled to the protection of a court of equity. That even in a court of law, it had been determined, that where the holder of a bill gave an indulgence to the acceptor, after judgment, the indorser was discharged. *English* v. *Darley*, 2 Bos. & Pul. 61. That of all forms of suretyship, that by indorsement emphatically entitles the surety to protection. The relative obligations between the holder and indorser require the former, in the first instance, to look to the drawer for payment, and to give notice of his default to the indorser. The relief given by courts of equity to sureties on a bond, is derived from the common-law principles in favor of indorsers. A surety has a right to come into equity, and compel the creditor to proceed against the principal debtor. *Nisbet* v. *Smith*, 2 Bro. C. C. 573; *Rees* v. *Berrington*, 3 Ves. jr. 540. If the party for whose benefit a contract is made prevent its execution, the contract is rescinded. The contract between the holder and indorser is, that the former shall seek payment of the maker, before he resorts to the indorser. If he disable the maker from paying, the indorser is discharged. If the holder of the bill or note give time to the acceptor or maker, in prejudice of

the indorsers, without *their concurrence, they will be discharged from all liability, although they may have been previously charged by notice of non-payment. Chitty on Bills 300 (Am. ed. 1817). The doctrine of equity, that a surety is discharged by any indulgence shown to the principal by the creditor, in prejudice of the surety, is applicable to every species of suretyship, whether absolute or collateral; and whether the liability of the co-obligors, sureties or indorsers, has been fixed by judgment or not. *Nisbet* v. *Smith*, 2 Bro. C. C. 578; *Rees* v. *Berrington*, 2 Ves. jr. 540; *Law* v. *East India Co.*, 14 Ves. 824. If giving time, staying execution, or taking new security, in consideration of indulgence, releases the surety, how much more ought he to be discharged by the countermand of an execution on which the money might have been levied. The statute of Maryland is only in affirmance of the pre-existing rules of equity. Nor does it apply to this case; the issuing of the *fieri facias*, at the plaintiff's solicitation, being a waiver of all right to demand a compliance with the act.

Key, in reply, insisted, that a court of equity would not relieve in such a case as this, even if the plaintiff was to be considered as a gratuitous surety. That the cases cited of co-obligors, or sureties in bonds, were not pertinent. This is a commercial contract. The maker of the note having made default, and the indorser having had legal notice of non-payment, becomes liable absolutely. His engagement ceases to be collateral and contingent, and he is converted into a principal debtor. The punctuality of *commercial dealings, and the preservation of paper credit, requires
*525] that it should be so. An indulgence given to the maker can no more discharge the indorser, when thus fixed, than an indulgence to him will discharge the maker. The law does not require that the holder should take any active measures of diligence; nor can a single case be found, where a court of equity has compelled him to take any such measures.

March 9th, 1818. LIVINGSTON, Justice, delivered the opinion of the court, and after stating the facts, proceeded as follows:—The only ground on which this decree can be sustained is, that the countermand by Davidson of the *fieri facias* which had issued on the judgment against Deblois, absolved the complainant from all liability on the one which had been recovered against him on the same note; and this has been likened to certain cases between principals and sureties: but it does not fall within any of the rules which it has been thought proper to adopt for the protection of the latter. Although the original undertaking of an indorser of a promissory note be contingent, and he cannot be charged, without timely notice of non-payment by the maker, yet, when the holder has taken this precaution, and has proceeded to judgment against both of them, he is at liberty to issue an execution or not, as he pleases, on the judgment against the maker, without affording any cause of complaint to the indorser; or if he issues an execution, he is at liberty to make choice of the one which he thinks will be *most beneficial to himself, without any consultation whatever with
*526] the indorser on the subject; nor ought he to be restrained, by any fear of exonerating the indorser, from countermanding the service of any execution which he may have issued, and proceeding immediately, if he chooses, on the judgment against the indorser. And the reason is obvious;

for by the judgment, they have both become principal debtors, and if the indorser suffer any injury by the negligence of the judgment-creditor, it is clearly his own fault, it being his duty to pay the money, in which case, he may take under his own direction the judgment obtained against the maker. By an act of Maryland, it seems expressly provided, which is, perhaps, only declaratory of the common law, that an indorser may tender to a plaintiff the amount of a judgment which he has recovered against the maker of a note, and obtain an assignment of it.

But, it is alleged, that in this case, there was a positive agreement on the part of Mr. Davidson with Mr. Prout, to issue a *fieri facias*, and proceed therein, and that by not doing so, the latter was thrown off his guard, and lost the opportunity of an indemnity out of the estate of Deblois. Without deciding what might have been the effect of such an agreement, it is sufficient to say, that there is no evidence of it. Mr. Davidson expressly denies that he agreed with the complainant, or even promised him to issue a *fieri facias* against the estate of Deblois, and that he went no further than to say, that he would consult his lawyer. Not being able immediately to find his lawyer, *and not knowing whether some advantage might not be taken, if he refused to comply with the complainant's request, he directed a *fieri facias* to be issued, which, for reasons assigned by him, was afterwards recalled. [*527 To this answer of Mr. Davidson, it is supposed by the complainant's counsel, no credit is due, because his commission on the sum in question gave him an interest in the controversy, and he might be answerable over to his principal for his conduct in this business. *Non constat*, that he would be entitled to any commission on this sum. It is quite as probable, he was acting under a fixed salary, which would not be affected by the event of the suit; and as to his responsibility, none could exist, if he had acted within the scope of his authority; and if he had transcended his power as agent, it would hardly be fair, that his constituents should suffer by his act. But admitting both objections, and they will not affect the verity of his answer; for if he had a direct interest in the event of the suit, and to the extent of the whole sum in controversy, still, his denial of a fact directly alleged in the bill, would be entitled to full credit, according to the rules of a court of equity, where not a single witness has been produced to disprove it, and where the circumstances of the case, and his own conduct, render his account a very probable one. If he had not been made a defendant, which was not a very correct course, he might have been examined as a witness for the other defendant, or for the complainant; but having been made a defendant, and being the only one acquainted with the transaction, the court is of *opinion, that his answer, uncontradicted as it is, is proof against the [*528 complainant of the non-existence of any such agreement as he alleges was made between them in relation to the issuing of the *fieri facias*.

Nor would Mr. Prout have suffered by the withdrawing of the *fieri facias*, which is the burden of his complaint, if he had done what he might and ought to have done. He had sufficient notice of this fact, before the *ca. sa.* was served, to have called and paid the judgment against him, and thus have obtained a control over the one which had been recovered against Deblois. If he had done this, instead of censuring the conduct of Davidson, he might have issued a *fieri facias* himself, and secured a property, which, if it has not been applied towards his relief, is owing more to his own neg-

lect, in not paying, in time, a debt justly due from himself, than to any other cause whatever. A person so regardless of his interest, as well as duty, as Mr. Prout has been, who has not only refused to pay a note indorsed by him, when due, but has put the holders to the trouble, delay and expense, of proceeding to judgment against him, has but little right to be dissatisfied, if a court of equity shall not think itself bound, by any extraordinary exertions of its powers, to extricate him from a difficulty and loss which he might so easily have avoided.

The decree of the circuit court is reversed, and the complainant's bill must be dismissed, with the costs of that court, to be paid by the complainant to the defendant.

Decree reversed.(*a*)

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*529] *Burton's Lessee *v.* Williams *et al.*

Lands in Tennessee.

The state of North Carolina, by her act of cession of the western lands, of 1789, ch. 3, recited in the act of congress of 1790, ch. 33, accepting that cession, and by her act of 1803, ch. 3, ceding to Tennessee the right to issue grants, has parted with her right to issue grants for lands within the state of Tennessee, upon entries made before the cession.

But, it seems, that the holder of such a grant may resort to the equity jurisdiction of the United States courts for relief.

Error to the Circuit Court of East Tennessee. This was an action of ejectment, brought by the plaintiff in error, to recover the possession of 5000 acres of land, lying in Maury county, in the state of Tennessee, and granted to the lessor of the plaintiff, by the state of North Carolina, on the 14th of July 1812.

The grant was founded on an entry, made on the 27th of October 1783, in the land-office of North Carolina, commonly called John Armstrong's office; on a warrant of survey, issued from the same office, on the 10th of July 1784; and on a survey made on the 26th of February 1812, under an act of the legislature of North Carolina, passed in 1811. The lands lay in that part of Tennessee in which the disposition of the vacant and unappropriated lands was reserved to the United States, by the act of congress of
*530] the 18th of April 1806, ch. 31. This title was offered *in evidence by the plaintiff, at the trial, and was objected to by the defendant, who claimed under a grant from Tennessee. The evidence was rejected by the court below; on which the plaintiff excepted, and the cause was brought by writ of error to this court.

March 2d. *Harper*, for the plaintiff, argued, that the state of North Carolina, under the conditions of her act of 1789, ch. 3, for ceding the western lands to the United States, had a right to perfect grants on all such entries as this, at any time after the cession, and not merely within the time which was limited by the then existing laws of North Carolina; the conditions of the cession being recited and confirmed in the act of congress of the 2d of April 1790, ch. 33, accepting that cession. That the act of North Carolina of 1803, ch. 3, for ceding this right to the state of Tennessee, with

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(*a*) See note to Lanusse *v.* Barker, *ante*, 148.

the assent of congress, was wholly inoperative and void, for want of that assent; congress not having assented, simply and unconditionally, as was intended by the legislature of North Carolina, but having coupled its assent with conditions destructive of the rights of that state and her citizens, under the act of cession. That, consequently, the act of congress of the 18th of April 1806, ch. 31, being founded on this act of North Carolina, and on the act of Tennessee of 1804, ch. 14, which rests on the same basis, is without authority, and void. That even if the act of North Carolina of 1803, ch. 3, were operative, it merely gives the state of Tennessee concurrent power with North Carolina, for perfecting these *titles, and does not divest the [*531
power of the latter state. And that if the power granted to Tennessee by this act was absolute and exclusive, while it existed, it reverted to North Carolina, when Tennessee, by assenting to the conditions imposed by congress in the act of April 18th, 1806, ch. 31, disabled herself from exercising this power or procuration, according to the terms and intentions of the grant from North Carolina. Co. Litt. 52, 202; Sheph. Touchstone 283.

Campbell, contrà, contended, that the state of North Carolina, by her act of 1803, ch. 3, transferred to Tennessee all the power to issue grants, reserved by her in the act of cession of 1789, on the conditions that the state of Tennessee should agree to said act, as a compact between the two states, and that the assent of congress should be obtained thereto. Tennessee did agree to the act, by her own act of 1804, ch. 14, and the assent of congress was given thereto, by the act of the 18th of April 1806, ch. 31. Consequently, the state of North Carolina had no power to issue the grant in question. That the provisions in the act of congress of the 18th of April 1806, ch. 31, relate only to the final disposition of the vacant lands in Tennessee, remaining after all the claims from North Carolina are satisfied, according to the conditions of the cession act, and do not impair the right acquired under titles derived from the latter state. That the transfer of power to perfect grants from North Carolina to Tennessee, vested *it in the latter, [*532
unconditionally and exclusively; and the power having once vested, cannot revert, or be divested. The authorities cited, as to reversion of powers, upon a breach of the conditions on which they were granted, are wholly inapplicable to transactions between independent communities and states. But even supposing the same rules in this respect were to be applied to their acts, as to those of private individuals, he contended, that Tennessee had performed the condition as near to the intent as might be, and that whatever is an equitable, ought to be considered a legal execution of a power. Co. Litt. 217; *Zouch* v. *Woolston*, 2 Burr. 1136; *Earl of Darlington* v. *Pulteney*, Cowp. 260. That the public documents, necessary to enable Tennessee to execute the power in question, were delivered to that state, according to the compact of 1803; and that it was executed by her, from 1806 to 1811, with the apparent acquiescence of North Carolina, which state ought not, therefore, now to be permitted to object, that the assent of congress thereto had not been sufficiently given. That this assent was deemed necessary to comply with that provision in the constitution, art. 1, § 10, which declares, that "no state shall, without the consent of congress, enter into an agreement or compact with another state," and because the United States had an interest in the subject-matter of the compact. This assent

was not intended for the benefit, or to secure the interests, of North Carolina; and the approbation of congress having been sufficiently manifested,
*533] that state has no *right to object to the mode in which the assent was given. That by her act of cession, the state of North Carolina reserved the right to issue grants, only in conformity to her then existing laws, but not to pass new statutes on the subject, like that of 1811. And that the state of Tennessee, by an act passed in 1812, declared this grant, and all others issued under similar circumstances, void; and provided, that they should not be read as evidence of title, in any court of the state; thus asserting her exclusive right, under the compact of 1803, to issue grants for lands within the state.

March 9th, 1818. JOHNSON, Justice, delivered the opinion of the court.—This case originates in a collision of interest and opinion between the states of North Carolina and Tennessee, and the United States, relative to their respective rights, in certain instances, to perfect titles to the soil of Tennessee. North Carolina, in the year 1812, issued the grant set up on the trial, in behalf of the plaintiff. Both Tennessee and the United States contend that North Carolina has relinquished the right to issue such a grant. And North Carolina replies, that her cession was conditional, and that the condition has been violated, or that the *causus fœderis* has never arisen.

The whole difficulty arises from the obscure wording, or doubtful construction, of the act of congress of April 18th, 1806. But after comparing all the acts of the respective states upon the subject, reviewing the events which led to the passage of that act of congress, and determining the motives
*534] which influenced *the parties in making the compact, which the act of congress contains, we are of opinion, that an exposition may be given, perfectly consistent with good faith, and leaving to North Carolina no reasonable ground for complaint. We here disavow all inclination, on the part of this court, to interfere, unnecessarily, in state altercations; we enter into the consideration of such collisions only so far as to secure individual right from being crushed in the shock. But in all such discussions, the questions necessarily arise, what has a state granted? and what was the extent of its power to grant? Those questions cannot be avoided.

It will be recollected, that the state of Tennessee originally constituted a part of the state of North Carolina; that in the year 1789, the latter state made a cession, both of soil and sovereignty, to the United States, of all the soil and country now comprised within the limits of Tennessee; and that in the year 1796, the state of Tennessee was admitted into the Union. Previous to the act of cession, North Carolina had made title to a considerable proportion of the soil of Tennessee, under circumstances which attached the title to a designated portion of soil, so that nothing more was necessary to vest a complete legal title, but what, in contemplation of her laws, was a mere formality—a survey and grant. In other instances, she had issued warrants for a specified quantity of land, but under which the holder had not yet definitively fixed his land-marks, so that he did not hold land, but only the evidence of a right to acquire land. These, and several other
*535] descriptions *of land-titles, as they are called, the act of cession makes provision for securing to the individual, to the full extent to which he was entitled under the laws of North Carolina. The words of the deed of

cession are these: "Where entries have been made agreeably to law, and titles under them not perfected, by grant or otherwise, then and in that case, the governor for the time being shall, and he is hereby required to perfect, from time to time, such titles, in such manner as if this act had never been passed. And that all entries made by, or grants made to, all and every person or persons whatsoever, agreeably to law, and in the limits hereby intended to be ceded to the United States, shall have the same force and effect, as if such cession had not been made; and that all and every right of occupancy and pre-emption, and every other right reserved by any act or acts, to persons settled and occupying lands within the limits of the lands hereby intended to be ceded as aforesaid, shall continue to be in full force, in the same manner as if the cession had not been made, and as conditions upon which the said lands are ceded to the United States:" And, "further, it shall be understood," &c., making a provision for the case of persons who shall lose the benefit of a location, because of its having been laid on a place previously located, and declaring that "they shall be at liberty to remove the location of such entry or entries, to any lands on which no entry has been specifically located, or on any vacant lands included within the limits of the lands hereby intended to be ceded." *Thus, under the act of cession, the United States held the right of soil in the vacant lands of [*536
Tennessee, qualified by the right which the state of North Carolina retained of perfecting the inchoate titles created under her own laws.

When the act was passed, admitting the state of Tennessee into the Union, congress omitted to insert any express provision respecting unappropriated land; and on this circumstance, the state of Tennessee set up a claim to all such land within her designated limits. But still she was embarrassed in the use of her supposed acquisition, by the rights which North Carolina retained of perfecting her own land-titles, and she could not obtain from a state, a cession of that right, without the consent of congress. This afforded the United States, ultimately, the means of resuming, in part, the soil that they were supposed inadvertently to have ceded to Tennessee, and was the ground-work of the compact which is exhibited in the act of 1806. The state of North Carolina, in the meantime, had passed an act, in 1803, entitled "an act to authorize the state of Tennessee to perfect titles to land reserved to this state by the cession act," but expressly subject to the assent of congress; and the two great objects of the act of congress of 1806, as avowed in the title, are "to authorize the state of Tennessee to issue grants and perfect titles to certain lands therein described, and to settle the claims to the vacant and unappropriated lands within the same;" or, in other words, to enable the state of Tennessee to acquire the absolute unqualified right (so far as it comported with *private right) of appropriating the soil [*537
within its limits, and, *eodem flatû*, to enter into a partition of that soil with the United States, connected with the rights thus acquired from North Carolina. And such, in effect, is the operation of the compact of 1806. The two contracting parties commence with drawing a line across the state, and then stipulate, that the soil to the westward shall be vested absolutely in the United States, and that to the eastward, in Tennessee. Now, it is absurd, to suppose, that when the United States proposed to acquire to themselves the absolute dominion over the soil to the westward, that they would have withheld that assent, without which Tennessee could not acquire it,

and of course, could not convey it to the United States. The words in which the assent of congress is expressed, are found in the close of the 2d section; they are these, "to which said act, the assent of congress is hereby given, so far as is necessary to carry into effect the objects of this compact." But these latter words, although at first view they may appear to be restrictive, really, in their operation, as here applied, must give the utmost latitude to that assent; because, nothing short of that latitude would give effect to the provisions of the compact. And upon considering the act of North Carolina, to which they refer, it will obviously appear, that those restrictive words were introduced with a view to another object. There are several provisions of mere detail contained in that act; these could take effect, without the assent of congress, and to those provisions these restrictive words must have had reference.

*538] *But it is contended, that in the very compact between the United States and Tennessee, the conditions of the act of cession have been violated, and the state of North Carolina was authorized to resume her rights. Without admitting either the premises or conclusion of this argument, we may be permitted to observe, that it is, at least, a perilous doctrine. That the members of the American family possess ample means of defence, under the constitution, we hope, ages to come will verify. But happily for our domestic harmony, the power of aggressive operation against each other is taken away; and the difficulty and danger of applying to the contracts of independent states, the principles of the common law relative to conditions, would, if necessary, incline this court to consider words of condition, in such cases, as words of contract. In this instance, the state of North Carolina has asserted the common-law right of entering for condition broken, and the unfortunate consequences may well be held up as a warning to others.

But in this case, the words used are not words of condition. On the contrary, the words of condition used with relation to the provision for securing vested freehold rights are dropped, and those applied to the other class of rights, are appropriate only to stipulation or contract, "it shall be understood," &c., are the words, as expressed in the quotation from that act. All the operation, then, which can be given to the provisions of the cession act, on the subject of these floating rights, is that of the stipulations of a treaty; and all the obligation resulting from those provisions, as well on behalf of

*539] the United States as of Tennessee, *was, that it should be honorably and in good faith executed. And this has been done: no more control has been exercised over those floating claims, than North Carolina might have exercised, and no obligation which North Carolina acknowledged with regard to those rights, has been violated.

The injuries complained of are, that these floating rights have been restricted in their original range, so as not to be permitted now to be located to the westward of the line of demarcation, and that they have also been restricted to the eastward, by the stipulations of Tennessee, to make certain appropriations for schools. But this reasoning is founded upon two assumptions that cannot possibly be admitted, to wit: That North Carolina herself could not, if she had thought proper, have made these appropriations, before the act of cession, and that after the act of cession, the United States could not have set apart any portion of the unlocated land for specified pur-

poses; or, in fact, have issued any grants or warrants for unappropriated land, until these floating claims had finally found a place of rest, after landing and embarking again a hundred times. It would have been nugatory, under such circumstances, to have made a cession of territory. These claims were not forgotten; Tennessee stipulates to make provision for them on her side of the line, and the United States to make provision on the other side, if Tennessee cannot satisfy them: so that the whole country is, in fact, open to the holders of these rights; but they are only, in the first instance, directed to a particular tract of country, to make their selection.

*With regard to the objection, that the appropriation of these lands was made to a single state, when they were expressly given for [*540 the use of the United States, including North Carolina, there is certainly nothing in it; for the erection of a state may have appeared to congres the most beneficial general purpose to which those lands could be appropriated; nor can the prohibition to locate warrants on the Cherokee lands be objected to, when it is considered, that it was actually illegal, under the laws of North Carolina; and the stipulation is expressly made in subservience to the laws of that state.

Upon the whole, we are decidedly of opinion, that the state of North Carolina has parted with the power to issue this grant, and could not resume it. But although we must decide against the action of the plaintiff in this case, because it rests upon that grant, it must not be inferred, that we think unfavorably of his right to the land. On the contrary, we have no doubt, so far as appears in this record, of the obligation on the United States to make provision for issuing a grant in his favor; and in the meantime, the courts of the United States are not without resources, in their equity jurisdiction, to afford him relief.

Judgment affirmed.

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*Murray's Lessee *v.* Baker *et al.* [*541

Statute of limitations.

The terms "beyond seas," in the proviso or saving clause of a statute of limitations, are equivalent to without the limits of the state where the statute is enacted; and the party who is without those limits, is entitled to the benefit of the exception.[1]

This was an action of ejectment, brought by the plaintiff in error, in the Circuit Court for the district of Georgia, to recover the possession of certain the lands lying in that state. At the trial, a special verdict was found as follows:

"We find, that the lessors of the plaintiff have not been in the state of Georgia, since the defendants, or their ancestors, came into possession of the premises sued for. We further find, that the ancestor of the defendants possessed the land, from about the year 1791 until his death, which happened about February last, and that the defendant, his children, and legal representatives, have been in possession thereof from that time. If the court are of opinion, that the case of the plaintiffs is excepted from the operation

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[1] Shelby *v.* Guy, 11 Wheat. 361; Bank of Alexandria *v.* Dyer, 14 Pet. 141; Davie *v.* Briggs, 97 U. S. 628; Peck *v.* Tease, 5 McLean 486; Ferris *v.* Williams, 1 Cr. C.C. 475; Lee *v.* Cassin, 2 Id. 112.

of the act of limitations of this state, passed the 21st day of March 1767, then we find for the plaintiffs, with ten cents damages; but if the court are of a contrary opinion, then we find for the defendants.

The judges of the court below divided on a motion that judgment should be entered up for the plaintiffs *on this verdict, and the question was thereupon certified to this court. The statute of limitations in question is as follows:

*542]

"Be it enacted, &c., that all writs of *formedon in descender, remainder and reverter* of any lands, &c., or any other writ, suit or action whatsoever, hereafter to be sued or brought, by occasion or means of any title heretofore accrued, happened or fallen, or which may hereafter descend, happen or fall, shall be sued or taken within seven years next after the passing of this act, or after the title and cause of action shall or may descend or accrue to the same, and at no time after the said seven years. And that no person or persons that now hath or have any right or title of entry into any lands, &c., shall, at any time hereafter, make any entry, but within seven years next after the passing of this act, or after his or their right or title shall or may descend or accrue to the same; and in default thereof, such person so not entering, and his heirs, shall be utterly excluded and disabled from such entry after to be made. Provided, nevertheless, that if any person or persons that is or shall be entitled to such writ or writs, or that hath or shall have such right or title of entry, be, or shall be, at the time of such right or title first descended, accrued, come or fallen, within the age of twenty-one years, *feme covert, non compos mentis*, imprisoned, or beyond seas, that then such person or persons, and his and their heir and heirs, shall or may, notwithstanding the said seven years are expired, bring his, her or their action, or make his, her or their entry, *as he, she or they might have done, before this act; so as such person or persons, or his, her or their heir and heirs, shall, within three years next after his, her or their full age, discoverture, coming of sound mind, enlargement out of prison, or returning from beyond seas, take benefit of, and sue for the same, and at no time after the said three years."

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March 1st. *Berrien*, for the plaintiff, argued, that the term "beyond seas," in the statute of limitations, was not to be construed literally, according to its geographical import, but liberally, and with reference to the protection which this clause of the statute was intended to afford. "Beyond seas, and out of the state, are analogous expressions, and must have the same construction." *Law* v. *Roberdeau*, 3 Cranch 174, 177, *per* MARSHALL, Ch. J. The expression "beyond seas," has been borrowed from a corresponding statute in Great Britain, where it has a local or geographical aptitude, which it does not possess here. The phraseology of the English statutes has been modified, to adapt it to the varying circumstances of that nation. Anterior to the accession of the first James, the northern part of the island was held by Scotland, in distinct sovereignty, and in this state of things, the expression "beyond seas" would have been inapt. A resident of Scotland, though that country was then foreign to England, would not have been within the proviso of the statute. Accordingly, we find, that the corresponding expression in the statutes passed anterior to *this period, is, "out of the realm." And Mr Justice WILMOT, in pronouncing his

*544]

opinion in the case of the *King* v. *Walker*, 1 W. Black. 286, observes, that "the legislature, by altering the phraseology of the statute, from 'out of the realm' to 'beyond seas' at this precise period, seems to have pointed to the case of a dwelling in Scotland." During the war of our revolution, the British army was in possession of part of the state of New York. It has been held there, that the maker of a promissory note, who was within the British lines, during such occupancy, and departed with the British army, at the close of the war, was out of the state, during that time, and therefore, not entitled to plead the statute in bar; and that the cause of action accrued only upon his coming into the state after the peace. "The party was out of the jurisdiction of the state; he was *quasi* out of the realm; he was, where the authority which was exercised, was derived, not from the state, but from the king of Great Britain, by right of conquest." *Sleght* v. *Kane*, 1 Johns. Cas. 76, 81. So, in this case, the plaintiffs were never within the jurisdiction of the state: and if, in the language of the Chief Justice, first cited, beyond seas, and out of the state, are analogous expressions, they are entitled to bring their action, at any time within three years after coming into the state. The opposite construction would involve the absurdity of refusing the protection of the statute to a person living in Chili, because access can be had to that remote country by land; whilst it is extended *to a person residing in the neighboring West India islands, because the seas must be passed in order to reach the latter. [*545

No counsel appeared to argue the cause on the other side.

March 9th, 1818. JOHNSON, Justice, delivered the opinion of the court.—This is an action of ejectment. The defence set up is the act of limitations of the state of Georgia. The only question which the case presents is, whether the plaintiff, who resided in Virginia, comes within the exception in the act in favor of persons "beyond seas?" On this question, the court are unanimously of opinion, that to give a sensible construction to that act, the words "beyond seas" must be held to be equivalent to "without the limits of the state," and order this opinion to be certified to the circuit court of the district of Georgia.

Certificate for the plaintiff.

*The Amiable Nancy.

Prize jurisdiction.—Damages.

The district courts of the United States have jurisdiction of questions of prize, and its incidents, independent of the special provisions of the prize act of the 26th June 1812, ch. 430.[1]

On an illegal seizure, the original wrongdoers may be made responsible, beyond the loss actually sustained, in a case of gross and wanton outrage; but the owners of the privateer, who are only constructively liable, are not bound to the extent of vindictive damages.

An item for loss by deterioration of the cargo, not occasioned by the improper conduct of the captors, rejected.

The probable or possible profits of an unfinished voyage, afford no rule to estimate the damages in a case of marine trespass.[2]

The prime cost or value of the property lost, and in case of injury, the diminution in value, by reason of the injury, with interest thereon, affords the true measure for estimating damages in such a case.

An item for the ransom of the vessel and cargo, which had been subsequently seized by another belligerent, as alleged, for want of papers, of which the vessel had been deprived by the first captors, rejected, under the particular circumstances of the case.

This was a suit for a marine trespass, commenced in the District Court for the southern district of New York, by the libellants and appellants, who were the owner, master, supercargo and crew of the Haytien schooner Amiable Nancy, against the defendants, who were the owners of the private armed American vessel Scourge. (Reported below, 1 Paine 111).

The libel stated, that the Amiable Nancy and her cargo belonged to the libellant, Peter Joseph Mirault, of Port-au-Prince, in the island of Hayti, or
*547] St. Domingo; *that the vessel, with a cargo of corn, sailed from Port-au-Prince, about the 7th of October 1814, on a voyage to Bermuda, and in the prosecution thereof, about the twenty-fourth day after sailing, in latitude 25 degrees north, was obliged, by stress of weather, to bear away for Antigua, there to refit, and again proceed on the said voyage; that whilst proceeding toward Antigua, about the 4th of November, in the same year, in latitude 17 degrees 54 minutes north, and in longitude 62 degrees 42 minutes west, the said Haytien schooner was boarded by an armed boat's crew, from the private armed American brig Scourge, commanded by Samuel Eames, and owned by the defendants; that Jeremy C. Dickenson, the first lieutenant of the said brig, with the said armed boat's crew, then and there, took possession of the Amiable Nancy, and robbed and plundered the libellants, respectively, of divers articles of wearing apparel, money, and other valuable effects, of a great value, being all that the libellants, at the time of the boarding as aforesaid, were possessed of; and also robbed and plundered the said schooner of her papers, notwithstanding that Samuel C. Lathrop, the officer commanding the marines of the aforesaid private armed brig, and who accompanied the said armed boat's crew, had reported to the said Jeremy C. Dickenson, that he had examined the said papers; that they were perfectly in order, and that the said schooner was a Haytien schooner as aforesaid; that the said armed boat's crew also robbed and plundered the said schooner of divers articles belonging to her
*548] tackle and apparel, to wit, of a log-reel and line, *lines and cordage, and also of poultry; and greatly ill-treated the libellants, and, in

[1] The Emulous, 1 Gallis. 563; The Amy Warwick, 2 Spr. 128; s. c. 2 Black 635; The Anna, Blatch. Pr. Cas. 337.

[2] La Amistad de Rues, 5 Wheat. 385; The Apollon, 9 Id. 362; The Lively, 1 Gallis. 315.

particular, knocked down and greatly bruised the libellant, Frederick Roux, and put the libellants in bodily fear and danger of their lives; that about twelve o'clock of the same night, the armed boat's crew aforesaid left the Amiable Nancy, and the said schooner was permitted to proceed on her course as aforesaid, and did so proceed, but her papers were not restored, nor any other article of apparel, money, nor any of the valuable effects of which the said schooner and libellants had been robbed and plundered, although the said master and supercargo did frequently and urgently remonstrate with the boarding-officer upon the impropriety of such conduct as aforesaid; and did then and there state, that the said schooner could not proceed without her said papers; but notwithstanding the remonstrances of the said libellants, nothing whatever which had been taken from the said schooner, and from the libellants, was restored. That the libellant, Galien Amie, was not permitted to go on board of the said private armed brig, although he earnestly requested permission so to do, with the intent to complain to the commander of the said private armed brig, of the conduct of his said armed boat's crew, and of requesting him to cause the papers and articles taken as aforesaid, to be restored to the libellants and the said schooner. That the said schooner continued on her course as aforesaid, and on or about the morning of the 8th of November, in the year aforesaid, arrived at the entrance of the harbor of St. John's, in the island of Antigua, when she was seized and detained by his Britannic majesty's *guard- [*549
brig Spider, on account of the want of her papers; and both the vessel and cargo were, for the same reason, libelled and proceeded against in the vice-admiralty prize court in the said island. That the Amiable Nancy was detained in the possession of the said guard-brig Spider, until the 24th of November; and in consequence of an agreement previously made between the captors aforesaid and the said supercargo, which he was advised to make, in order to avoid the further detention, deterioration of the cargo, and total loss of the same, as of the said schooner, the schooner and her cargo were condemned as good and lawful prize, and were immediately delivered up to the libellant, the supercargo aforesaid, on an engagement to pay the said captors the sum of $1000, and all law and court charges, to a great amount, to wit, to the amount of about $542.21, which said compromise, law and court charges, together amounted to the sum of $1542.21, which the libellant, Frederick Roux, was obliged to pay, and did actually pay, in order to procure the liberation of the said vessel and cargo. And in order to pay the same, the said last-mentioned libellant was obliged to pay, and did pay, the further sum of $536.44, by selling bills to procure specie to make the said payment; beside which, the said cargo of corn sustained a loss of $1200, by its detention in port as aforesaid, deterioration and fall in price; and the owner of said schooner did sustain further loss by the breaking up of his said voyage, and the said schooner being obliged to leave Antigua in ballast, although a full freight was offered to him. That in consequence of [*550
*the robbery and plunder of the said schooner, and the ill-treatment of the libellants, and the capture and detention as aforesaid, heavy loss and damage accrued to the libellants, respectively, amounting in the whole to $15,000. The libel then prayed, that the defendants, as the owners of the Scourge, might be decreed to pay to the libellants the damages, respectively sustained by them, by the illegal conduct of the said boat's crew, with all

other charges and expenses thereby incurred, and losses therefrom accruing, and for such other relief as might be suited to the case.

The defendants, by their answer and plea, admitted that they were, at the time mentioned in the libel, the owners of the Scourge, which was regularly commissioned as a private armed vessel, during the late war; and that, whilst cruising on the high seas, she met with the said Haytien schooner; but they did not admit, that the plundering, outrages and other unlawful acts, mentioned in the libel, were committed as therein charged; they did however, admit, that the said schooner was boarded by a crew from the Scourge, under the belief that she was an enemy, and that some improper acts were committed by some of the said crew; but they denied their responsibility therefor, especially, as the said crew or some of them, were punished for their improper conduct.

Samuel C. Lathrop, captain of marines on board the Scourge, proved, that whilst the said vessel was on a cruise, they fell in with the Amiable Nancy, about the 4th or 5th of November 1814, and boarded her; that *551] Lieut. Dickenson and himself, with twelve *or thirteen of the crew, went into the boarding boat, under the command of Lieut. Dickenson, and that as soon as the boat came alongside of the schooner, Dickenson and himself went on board of her, and all the men but one followed; that the men immediately commenced plundering the vessel, which Dickenson saw; and took no measures to prevent; that the witness examined her papers, and found her to be a Haytien schooner, and that they were all regular, and so reported to Lieut. Dickenson. That the boat's crew ought not to have gone on board of the schooner at all; but Dickenson did not order them back, and permitted them to proceed in breaking into the cabin, breaking open the trunks of the master and supercargo, plundering their contents, and the schooner's crew of their clothes and effects, and throwing them in bundles into the boat alongside the schooner; that the master and supercargo complained to Dickenson of the conduct of his crew, and especially of their destruction of the schooner's papers; and the supercargo also complained of being knocked down; but Dickenson took no notice of their complaints, and suffered the boat's crew to continue their plundering, two hours, on board of the schooner, though he had examined the schooner's papers, and made his report, as before stated, in ten minutes after going on board.

Commissions were issued to Antigua and Port-au-Prince, to take testimony on the part of the libellants. Under the Antigua commission, it was proved, that the Amiable Nancy and her cargo was seized, libelled and con- *552] demned at Antigua, on account of her *want of papers. That the supercargo compromised with the captors for $1000, and court charges $542.21, which he was advised to do, as most for the interest of the owner. That it was necessary to pay this amount in specie, which could only be raised by a sale of the bills for which the cargo was sold, and was done at a loss of $536.44; that other sums were disbursed for the vessel, making in the whole $2127.60. During the detention of the vessel, the price of corn fell a dollar a bushel, and the cargo was injured by the search of the schooner, made by the Spider's crew, which occasioned a loss of $1200. The expenses of the schooner at Antigua were proved to be $414.

The value of the articles plundered from the vessel, master, supercargo,

and crew, was proved by one of the witnesses, and by the protest; also the ill-treatment and personal violence complained of.

Under the commission to Port-au-Prince, it was proved, that the libellant, Peter Joseph Mirault, was the owner of both the schooner and cargo, and that the schooner was a Haytien vessel, regularly documented as such. The detention and plunder of the schooner, by the boat's crew of the Scourge, was fully and particularly proved by one of the seamen on board of the schooner. The object of the voyage to Bermuda, and the loss sustained in consequence of its being broken up, are also proved.

On the hearing of the cause, in the district court, it was referred to the clerk or his deputy, to associate with him two merchants, and report the damages sustained by the libellants. The deputy-clerk accordingly *associated with him two respectable merchants, one chosen by each of the parties, who reported the damages as follows: [*553

Money paid for redeeming vessel and cargo, at Antigua, after condemnation		$2127 60	
Loss sustained on sales of the cargo of corn, at Antigua, in consequence of the capture		1200 00	
Detention, wages of the crew at Antigua, in consequence of seizure by the Spider brig, occasioned by the loss of ship's papers		414 00	
Articles plundered from the schooner Amiable Nancy		25 00	
Money and effects plundered from M. Roux, the supercargo		470 00	
Money and effects plundered from the officers and crew of the Amiable Nancy—			
From Captain Amie	100 00		
Moriset, mate	80 00		
E. Lenau	54 00		
J. J. Loiscau	53 00		
Michael	10 00		
Savou	7 00		
		304 00	
			4540 60
*Loss sustained in consequence of the expenses occasioned by the seizure and condemnation in Antigua, growing out of the Amiable Nancy having been deprived of her papers by the acts of the officers and crew of the Scourge, as proved by the deposition of Samuel Dawson and F. Lavaud, of Port-au-Prince [*554			3500 00
			8040 60
Interest on this sum, from 1st January 1815, till the 1st July 1817, at 6 per cent. per annum			1206 07
			9246 67
Allowance for M. Roux's expenses to and from Port-au-Prince, Antigua, Boston, &c.; detention in New York, loss of time, and other incidental expenses, procuring evidence, and attending the trial			1500 00
			$10,746 67

This report was confirmed by the court, and it was further ordered by the court, that the defendant should pay to the libellant, for personal injuries, as follows:

To the supercargo, five hundred dollars	$500
To the captain, one hundred dollars	100
To the mate, one hundred dollars	100
To the sailor, fifty dollars	50
	$750

*555] *And that the defendants should pay to the libellants $1000 for the commission claimed by the supercargo, Frederick Roux, $750 for counsel fees, the proctor's costs, and the costs of court.

The defendants appealed from the decision of the district court to the circuit court for the southern district of New York, where it was heard in September term 1815, and the following decree made:

This appeal having been argued, &c., this court, after mature deliberation thereon, do order, adjudge and decree, that the sentence of the district court, which has been appealed from, be reversed, and this court proceeding to assess the damages in this cause, make the following allowances, that is to say:

To the Owner of the Schooner.

1. For expenses during her detention at Antigua, in conformity with the estimate of the consignee	$300 00	
2. For expenses of the mate and supercargo while there, according to the testimony of the same witness	70 00	
3. For articles plundered from schooner	25 00	
Interest on these sums at 10 per cent. from 1st of January 1815, to 1st September 1817, two years and eight months	103 94	
		498 94

*556] **To the Master of the Schooner.*

1. For articles taken from him	100 00	
The same interest on this sum	26 66	
2. For personal injuries	100 00	
		226 66

To the Supercargo.

1. For articles plundered of him	470 00	
The like interest on this sum	114 32	
2. For personal wrongs	500 00	
		1084 32
3. For his expenses in collecting testimony at Antigua, Port-au-Prince, &c., and attending trial		750 00

To the Mate.

1. For the property lost by him	80 00	
The like interest on this sum	21 32	
2. For injury to his person	100 00	
		201 32

The Amiable Nancy.

To Lenau, the Sailor.

1. For property robbed of him.....	54 00		
The like interest on this sum.....	14 40		
2. For injury to his person.....	50 00		
			118 40
			$2879 64

*It is, therefore, further ordered and directed, that there be paid by the appellants, to the respondents and libellants, the said sum of [*557 $2879.64, in the manner and proportions following, that is to say; to the libellant, Peter Joseph Mirault, owner of the schooner and cargo, the sum of $498.94; to the libellant, Galien Amie, master of the schooner, the sum of $226.66; to the libellant, Frederick Roux, the supercargo, the sum of $1834.32; to the libellant, Anthony Morisset, the mate, the sum of $201.32; to the libellant, Elie Lenau, one of the mariners, the sum of $118.40. And it is further ordered, adjudged and decreed, that the appellants pay the further sum of $750 for counsel fees in the district court, and that they also pay the proctor's costs in the said court, and the costs of that court, to be taxed. And it is further ordered and decreed, that each party pay his own costs in this court. From which decree, the libellants appealed to this court.

This cause was argued by *Sergeant* and *Baldwin*, for the appellants (citing *The Lucy*, 3 Rob. 208; *The Narcissus*, 4 Ibid. 17; and *The Lively*, 1 Gallis. 315), and by *D. B. Ogden*, for the respondents, citing *Del Col* v. *Arnold*, 3 Dall. 332.

March 11th, 1818, STORY, Justice, delivered the opinion of the court.—The jurisdiction of the district court to entertain *this suit, by virtue [*558 of its general admiralty and maritime jurisdiction, and independent of the special provisions of the prize act of the 26th of June, 1812, ch. 107. has been so repeatedly decided by this court, that it cannot be permitted again to be judicially brought into doubt. (*a*) Upon the facts disclosed in the evidence, this must be pronounced a case of gross and wanton outrage, without any just provocation or excuse. Under such circumstances, the honor of the country, and the duty of the court, equally require, that a just compensation should be made to the unoffending neutrals, for all the injuries and losses actually sustained by them. And if this were a suit against the original wrongdoers, it might be proper to go yet further, and visit upon them, in the shape of exemplary damages, the proper punishment which belongs to such lawless misconduct. But it is to be considered, that this is a suit against the owners of the privateer, upon whom the law has, from motives of policy, devolved a responsibity for the conduct of the officers

(*a*) See 2 Wheat. Appendix, note 1, p. 5. The jurisdiction of the admiralty, as a court of prize, has been recently reviewed in England, on an application to the court of chancery for a prohibition, in which it was determined, that this jurisdiction does not depend upon the prize act or commission, nor cease with the cessation of hostilities; but that it extends to all the incidents of prize, and to an indefinite period after the termination of the war. Ex parte Lynch, 1 Madd. 15.

and crew employed by them, and yet, from the nature of the service, they
*559] can scarcely ever be able to secure to themselves an *adequate indemnity in cases of loss. They are innocent of the demerit of this transaction, having neither directed it, nor countenanced it, nor participated in it in the slightest degree. Under such circumstances, we are of opinion, that they are bound to repair all the real injuries and personal wrongs sustained by the libellants, but they are not bound to the extent of vindictive damages. While the government of the country shall choose to authorize the employment of privateers in its public wars, with the knowledge that such employment cannot be exempt from occasional irregularities and improper conduct, it cannot be the duty of courts of justice, to defeat the policy of the government, by burdening the service with a responsibility beyond what justice requires, with a responsibility for unliquidated damages, resting in mere discretion, and intended to punish offenders.

As the respondents have not appealed from the decree of the circuit court, that decree, so far as it allows damages against them, is not re-examinable here. And the only inquiry will be, whether any of the items allowed by the district court, were improperly rejected the circuit court.

And first, as to the item of $1220 for losses sustained in the sale of the cargo at Antigua. This loss is said to have been occasioned partly by the deterioration of the corn, by sea damage, the mixing of the damaged with the sound corn by the improper conduct of the crew of the Spider brig of war, and partly by a fall of the price of corn, during the detention of the vessel at Antigua. We are of opinion, that this item was properly rejected.
*560] The injury to *the corn was in no degree attributable to the improper conduct of the officers and crew of the privateer. The vessel was actually bound to Antigua, at the time when she was met by the privateer, under a necessity occasioned by stress of weather, and the fall of the market there is precisely what would have arisen, upon the arrival of the vessel, under ordinary circumstances. Unless, therefore, the sale of the corn was compelled at Antigua, solely by the misconduct of the privateer (which, in our opinion, was not the case), the claim for such loss cannot be sustained.

Another item is, $3500, for the loss of the supposed profits of the voyage on which the Amiable Nancy was originally bound. In the opinion of the court, this item also was properly rejected. The probable or possible benefits of a voyage, as yet *in fieri*, can never afford a safe rule by which to estimate damages, in cases of a marine trespass. There is so much uncertainty in the rule itself, so many contingencies which may vary or extinguish its application, and so many difficulties in sustaining its legal correctness, that the court cannot believe it proper to entertain it. In several cases in this court, the claim for profits has been expressly overruled ; and in *Del Col* v. *Arnold* (3 Dall. 333) and *The Anna Maria* (2 Wheat. 327), it was, after strict consideration, held, that the prime cost, or value of the property lost, at the time of the loss, and in case of injury, the diminution in value, by reason of the injury, with interest upon such valuation, afforded the true measure for assessing damages. This rule may not secure a complete
*561] *indemnity for all possible injuries ; but it has certainty, and general applicability, to recommend it, and in almost all cases, will give a fair and just recompense.

The next item is $2127.60, for the ransom of the vessel and cargo, and

the payment of the costs of court. The evidence upon this head is not very satisfactory in its details. It is asserted, that the vessel was seized for the want of papers, but whether as prize of war, or to enforce a municipal forfeiture, is not distinctly stated; and no copy of the proceedings of the court is produced, to clear up a single doubt or obscurity. Nor does it appear, whether the compromise was made, before or after the libel was filed; and it is admitted, that it was made, without taking the advice of counsel, upon the mere opinion of a merchant at Antigua, who supposed that a condemnation would certainly ensue. Upon what legal grounds this opinion could be reasonably entertained, it is extremely difficult to perceive. Assuming that the vessel and cargo were seized as prize of war, it cannot for a moment be admitted, that the mere want of papers could afford a just cause of condemnation. It might be a circumstance of suspicion; but explained (as it must have been) by the preparatory examinations of the officers and crew, and by the fact of a voluntary arrival, it is difficult to suppose, that there could be any judicial hesitation in immediately acquitting the property. And the furthest that any prize court could, by the utmost straining, be presumed to go, would be to order further proof of the proprietary interest. It would be *the highest injustice to the British courts, to suppose that the mere want of papers, under such circumstances, could draw [*562 after it the penalty of confiscation. We do not, therefore, think, that the ransom was justifiable or reasonable. The utmost extent of loss to which the owner was liable, was the payment of the costs and expenses of bringing the property to adjudication; and for such costs and expenses, so far as they were incurred and paid, the owner is now entitled to receive a recompense. In this respect, the decree of the circuit court ought to be amended.

The item for the supercargo's commission was also properly rejected. It does not appear, with certainty, to what sum he was entitled; and under the circumstances, if lost (which is not satisfactorily shown), the commissions were not lost by any act for which the respondents are liable. The sum allowed for the travel, attendance and expenses of the supercargo in procuring testimony, by the circuit court, is, in our judgment, an adequate compensation.

The sum of $44 was (probably by mistake) deducted by the circuit court from the expenses at Antigua. This sum is to be re-instated.

To the decree of the circuit court there are, consequently, to be added the following sums, viz: For expenses and costs of court at Antigua, $542.21. The loss on the exchange to pay that sum (say), $188. The short allowance of expenses, $44. In the whole, amounting to the sum of $774.21, on which interest, at the rate of six per *cent., is to be allowed, from the time of payment up to the time of this judgment. And the [*563 decree of the circuit court is to be reformed accordingly.

Decree reformed.

Craig *v.* Leslie *et al.*

Legacy.—Equitable conversion.

R. C., a citizen of Virginia, being seised of real property in that state, made his will: "In the first place, I give, devise and bequeath unto J. L.," and four others, "all my estate, real and personal, of which I may die seised and possessed, in any part of America, in special trust, that the afore-mentioned persons, or such of them as may be living at my death, will sell my personal estate to the highest bidder, on two years' credit, and my real estate on one, two and three years' credit, provided satisfactory security be given, by bond and deed of trust: In the second place, I give and bequeath to my brother T. C." an alien, "all the proceeds of my estate, real and personal, which I have herein directed to be sold, to be remitted to him, accordingly as the payments are made, and I hereby declare the aforeside J. L." and the four other persons, "to be my trustees and executors for the purposes afore mentioned:" *Held*, that the legacy given to T. C., in the will of R. C., was to be considered as a bequest of personal estate, which he was capable of taking for his own benefit, though an alien.

Equity considers land, directed, in wills or other instruments, to be sold and converted into money, as money; and money, directed to be employed in the purchase of land, as land.[1]

Where the whole beneficial interest in the land or money, thus directed to be employed belongs to the person for whose use it is given, a court of equity will permit the *cestui que trust* to take the money *or the land, at his election, if he elect, before the conversion is made.[2]

*564]

But in case of the death of the *cestui que trust*, without having determined his election, the property will pass to his heirs or personal representatives, in the same manner as it would have done, if the conversion had been made, and the trust executed in his life time.

The case of Roper *v.* Radcliff, 9 Mod. 167 examined; distinguished from the present case; and, so far as it conflicts with it, overruled.

This was a case certified from the Circuit Court for the district of Virginia, in which the opinions of the judges of that court were opposed on the following question, viz: Whether the legacy given to Thomas Craig, an alien, in the will of Robert Craig, is to be considered as a devise, which he can take only for the benefit of the commonwealth, and cannot hold; or a bequest of a personal chattel, which he could take for his own benefit?

This question grew out of the will of Robert Craig, a citizen of Virginia, and arose in a suit brought on the equity side of the circuit court for the district of Virginia, by Thomas Craig, against the trustees named in the will of the said Robert Craig, to compel the said trustee to execute the trusts, by selling the trust-fund, and paying over the proceeds of the same to the complainant.

The clause in the will of Robert Craig, upon which the question arose, was expressed in the following terms, viz: "In the first place, I give, devise and bequeath unto John Leslie" and four others, "all my estate, real and personal, of which I may die seised or possessed, in any part of America, in special trust, that the afore-mentioned persons, or such of them as *may be living at my death, will sell my personal estate to the highest bidder, on two years' credit, and my real estate on one, two and three years' credit, provided satisfactory security be given, by bond and deed of trust. In the second place, I give and bequeath to my brother, Thomas Craig, of Beith parish, Ayrshire, Scotland, all the proceeds of my estate, both real and personal, which I have herein directed to be sold, to be remitted unto him accordingly, as the payments are made; and I hereby declare the aforesaid

*565]

[1] Seymour *v.* Freer, 8 Wall. 202; Hawley *v.* James, 5 Paige 318; s. c. 16 Wend. 61.

[2] Smith *v.* Starr, 3 Whart. 62; Rice *v.* Bixler, 1 W. & S. 445.

John Leslie" and the four other persons, "to be my trustees and executors for the purposes afore mentioned."

The attorney-general of Virginia, on behalf of that state, filed a cross-bill against the plaintiff in the original suit, and the trustee; the prayer of which was, to compel the trustee to sell the trust-estate, so far as it consisted of real estate, and to appropriate the proceeds to the use of the said commonwealth, by paying the same into its public treasury.

The will of Robert Craig was proved in June 1811, and the present suit was instituted, some time in the year 1815.

February 20th. *Nicholas* (Attorney-General of Virginia), argued, that most, if not all nations, have imposed some restrictions upon the capacity of aliens to hold property within the territory of the nation. The law of England and the law of Virginia being the same in this respect, there is no want of reciprocity, and there is a peculiar fitness in extending the same rule to British subjects in this country, as is imposed on American *citizens in England. By the law of England, an alien cannot take a [*566 freehold by inheritance; he may take by purchase, but cannot hold: it escheats to the crown, upon an inquest of office. Nor is this incapacity confined to a freehold interest: it extends to leaseholds, and any the smaller interest in lands. Co. Litt. 2 *b*, Harg. notes; *Calvin's Case*, 7 Co. 18 *b*. The severity of this rule has been relaxed only for the benefit of commerce, and that very partially. An alien merchant may take a lease for years of a house for habitation, but not of lands, &c. And no other alien can even take a lease of a house for habitation. Ibid. The rule may be considered as illiberal, and inconsistent with the enlightened spirit of the age; but its wisdom may be vindicated on many grounds; and it can only be dispensed with by the legislative will, or by compact with foreign nations. As Lord MANSFIELD said of the laws against the Papists, "whether the policy be sound or not, as long as they continue in force, they must be executed by courts of justice, according to their true intent and meaning; the legislature only can vary or alter the law." *Toone* v. *Blount*, Cowp. 466.

The property in question consisted of real estate, which remained in specie, at the time of the devisor's death. The devise of a trust in lands cannot operate for the benefit of an alien. No equitable fiction can change the specific quality of the property. It is the settled doctrine of the common law, that an alien *cestui que *trust* can only take for the king's use. [*567 *King* v. *Holland*, Sty. 20; Alleyn 14; Roll. Abr. 154, 534; *Attorney-General* v. *Sir George Sands*, 3 Ch. Rep. 33; Hob. 214; 1 Mod. 17; Hardr. 495; Cro. Jac. 512; Gilbert on Uses and Trusts 243; 1 Com. Dig. 300; 1 Bac. Abr. tit. Alien, C. 132; *Harrison's case*, Mr. Jefferson's correspondence with Mr. Hammond, State Papers (Waite's ed.) vol. 1, p. 374. All the reasons of policy which incapacitate him from holding a legal estate in lands, equally apply to disable him from holding an equitable estate in the same species of property; it is the usufruct, of which the law aims to deprive him. Trust estates are governed by precisely the same rules as legal estates. "The *forum* where it is adjudged," says Lord MANSFIELD, speaking in a court of equity, "is the only difference between trusts and legal estates. Trusts here are considered, as between the *cestuis que trust*, and trustee (and all claiming by, through or under them, or in consequence of their estates),

as the ownership and as legal estates, except when it can be pleaded in bar of this right of jurisdiction. Whatever would be the rule of law, if it was a legal estate, is applied in equity to a trust estate." *Burgess* v. *Wheate*, 1 W. Bl. 160. Again, speaking of the case of *Banks* v. *Sutton*, he says, "So that I take it, by the great authority of this determination, on clear law and reason, *cestui que trust* is actually and absolutely seised of the freehold, in consideration of this court; and that, therefore, the legal consequence of an actual seisin of the freehold, shall, in this court, follow, for the
*568] benefit of one in the **post.*" Ibid. 161-62. The *cestui que trust*, in the present case, takes an interest which extends to the whole estate, with an election to take it as land. Nobody but he can compel the trustees to sell, and they may hold the trust, and apply it for the benefit of the *cestui que trust* for ever. This is precisely the mode in which the monastic and other ecclesiastical institutions perverted the invention of uses, in order to evade the statutes of mortmain, and they might be applied in the same manner to evade the disability of aliens to hold a legal estate in real property. Even supposing this to be a personal trust; it is a devise of the profits growing out of land, which would, until a sale, accumulate for the advantage of an alien, and is equivalent to a devise of the land itself to an alien. 1 Salk. 228; 1 Eq. Cas. Abr. 98; 1 Ves. 41; Co. Litt. 46 *a*; Cro. Eliz. 190. There is nothing compulsory upon the trustees to sell, and by collusion between them and the *cestui que trust*, the sale might be postponed for ever, whilst an alien enjoyed the profits of the lands, and transmitted them to his representative.

But this devise of the proceeds of the sale of lands was, in effect, a devise of real property. The leading case on this subject, *Roper* v. *Radcliffe*, 9 Mod. 167, 181, is strongly fortified by subsequent decisions. *Attorney-General* v. *Lord Weymouth*, Ambl. 20; *Davers* v. *Dewes*, 3 P. Wms. 46; *Hill* v. *Filkins*, 2 P. Wms. 6; 10 Mod. 483; *King* v. *Inhabitants of Wivelingham*, 2 Doug. 737. In *Roper* v. *Radcliffe*, it was solemnly deter-
*569] mined, *that lands given in trust, or devised to pay debts or legacies, shall be deemed as money in respect to creditors, but not in respect to the heir-at-law or residuary legatee, in respect to whom they shall be deemed in equity as lands: and that, consequently, the residue, in that case, being devised to persons incapable of holding an interest in lands, the devise was void. The application of this principle to the present case is obvious. Nor can the consequence of forfeiture be avoided by the *cestui que trust* electing to take the property as money. The exercise of the right of election for such a purpose was denied in *Roper* v. *Radcliffe*, and in the *Attorney-General* v. *Lord Weymouth*.

The rights of the commonwealth may be enforced in a court of equity, because the disability of an alien to hold lands for his own benefit, is not considered as a penal forfeiture, but arises merely from the policy of the law. It has, therefore, been adjudged in equity, that he cannot demur to the discovery of any circumstances necessary to establish the fact of alienage. *Attorney-General* v. *Duplessis*, Parker 144; 5 Bro. P. C. 91.

Wickham, contrà, argued, that this was a mere question as between the heirs and personal representatives. If the property in question be real property, in the view of a court of equity, it is admitted, that an alien can-

not hold it. But on the other hand, if it be personal property, it cannot be denied, that he may take and hold it. If, as between citizens, *it be personal property, it must be so as respects aliens. A court of law [*570 can only look to the legal quality of the property; at law, the interest is vested in the trustee; but a court of equity takes notice of the title of the *cestui que trust*, as beneficially interested, and regards the quality of the estate as respects his interest only. It is incontestible, that there may be personal trusts of real property. Such are the familiar instances of trusts for the payment of debts, and legacies charged on land; trusts for raising portions, and bankrupts' estates; in all of which the property goes to the personal representatives, without any question as to the citizenship or alienage of the *cestui que trust*. It is an elementary principle, which lays at the very foundation of the doctrines of equity, that land directed to be sold and converted into money, and money directed to be employed in the purchase of land, are considered as that species of property into which they are directed to be converted. *Doughty* v. *Bull*, 2 P. Wms. 323; *Attorney-General* v. *Johnston*, Ambl. 530; *Yates* v. *Compton*, 2 P. Wms. 308; *Fletcher* v. *Ashburner*, 1 Bro. C. C. 501; *Ackroyd* v. *Smithson*, Ibid. 503; *Berry* v. *Usher*, 11 Ves. 87; *Robinson* v. *Taylor*, 2 Bro. C. C. 589; *Williams* v. *Coade*, 10 Ves. 500; *Biddulph* v. *Biddulph*, 12 Ibid. 160. And it is immaterial, in what manner the direction is given, whether by will or deed; or in what state the property is found, in land or not. *Edwards* v. *Countess of Warwick*, 2 P. Wms. 171; *Biddulph* v. *Biddulph*, 12 Ves. 160; *Thornton* v. *Hawley*, 10 Ibid. 129. The argument on the other side, that the alien having the *right to elect that the property should not be sold, therefore, it must he considered as land, may be answered by another, [*571 equally good: that having the right to say it shall be sold, it must, therefore, be considered as money. But it is denied, that an alien has an election to make it real property. As an infant cannot make an election, for want of capacity (*Seely* v. *Jago*, 1 P. Wms. 389; *Earlom* v. *Saunders*, Ambl. 241), so an alien cannot elect to take, because he cannot hold real property. The right of election is a benevolent principle, applying for the benefit, not for the injury of parties. *Grimmitt* v. *Grimmitt*, Ambl. 210. The *cestui que trust*, in this case, has elected to take it as money, by his bill praying for a sale. But supposing him to have been silent, the elementary writers lay down the rule, that it remains personal property. As the party who has his election, may determine to take the property as land, to be sold for his benefit, or money to be invested in land, the question can only arise between the heirs and personal representatives. Some cases, which appear to be exceptions to the rule, confirm it. Such are the cases of a resulting trust to the heir, where the purposes of the trust are fulfilled, or at an end (*Hewitt* v. *Wright*, 1 Bro. C. C. 86; and see 16 Ves. 191; 18 Ibid. 174; 1 Ves. & B. 272); the cases where the union of title to the estate, as real and personal, extinguishes the demand (*Pulteney* v. *Lord Darlington*, 1 Bro. C. C. 226), and the cases where the intention is obscure. The rule extends to all cases where the quality of money *is imperatively fixed on land by the will or deed. [*572

As to *Roper* v. *Radcliffe*, its analogy to the present case is remote; it has always been considered a very questionable case; and it is not to be put in competition with the more direct authorities already cited. By the act of parliament, under which that case was determined, a Catholic cannot even

purchase; but at common law, an alien may not only purchase, but hold against all the world, except the crown. That case is not confirmed by Lord Chancellor KING, in *Davers* v. *Dewes*. On the contrary, he says, that if the point "were *res integra*, it would be, indeed, very questionable." 3 P. Wms. 46. Its reasoning is also questioned by Lord MANSFIELD. *Foone* v. *Blount*, Cowp. 467. The case of the *Attorney-General* v. *Lord Weymouth*, Ambl. 20, does not fortify it, and has no analogy to the case now before the court. Here is no devise of the annual perception of profits, but the *cestui que trust* is entitled to the proceeds of the sale of the land, as a sum in gross, and there is no precedent for confiscating profits of an estate purchased by an alien, which profits were actually received before office found. Nor can the argument, that, by collusion between the trustee and the alien *cestui que trust*, the latter may go on for ever receiving the profits of land, be supported; because it is arguing against a right, from its possible abuse (always an unsound mode of reasoning), and because the same thing may
*573] happen between an alien and any *ostensible owner of land. All that a court of equity, in any case, could do, would be to refuse to decree the land to the alien, and compel him to relinquish his claim, unless he took money. But equity will not aid to enforce a confiscation. Thus, where the testator directed money to be laid out in land, the money not having been laid out, Lord ROSSLYN held, that the crown, on failure of heirs, had no equity against the next of kin, to have it laid out in real estate, in order to claim by escheat. *Walker* v. *Denne*, 2 Ves. jr. 170.

The *Attorney-General*, in reply, admitted, that in considering the legal operation of the devise, the national character of the devisee was to be laid out of view; and that the estate which its terms would pass, could not be varied by any consideration of that character. As an alien is capable of taking (though not of holding) a direct fee in the lands, he is also capable of taking any lesser estate than a fee, under any modification of trust, express or implied. There is nothing, therefore, in the character of an alien, to repel, or even to narrow, the legal operation of the terms of the devise. Whatever estate they would pass to a citizen, the same they will pass to an alien. What estate then would pass to a citizen? It is said, a personal estate only, because, the testator having directed the land to be sold, has stamped upon it the character of personal property. But this is not the whole effect of the terms of the devise. They give to the legatee the
*574] option of taking the land; and *in so doing, they give him an interest in the land itself. This option, thus cast upon the legatee, is not the effect of any act to be done by him. To create the right of election, it is not necessary that he should actually elect, or that he should be able to elect. The mistake on the other side results from confounding the right of election with the exercise of that right. The right to choose is the legal effect of the devise, and stamps a character on the estate. The fact of electing, is a subsequent act, which may or may not take place; but which, whether done or not, cannot alter either the character of the devise, or the option which it casts upon every one capable of taking under it, or the legal estate in the lands which this option creates. The option thus given to the devisee, by the terms of the will, is an operative principle, which, whether exercised or not, still gives *eo instanti* that the will takes effect, an interest

in the lands, which, if the devisee be incapable of holding, they pass to the commonwealth. So far is the effect of this option from awaiting an act of election to be done by the devisee, and depending on such act, that it has been decided, where a subsequent election had been made to take as money, by persons disabled to hold the interest in land, that the act of election came too late to change the character of the devise, which, by virtue of the option it carried with it, had thrown upon the devisee an estate in the lands, the instant the will itself began its operation. It is true, that the decision in *Roper* v. *Radcliffe* is founded on a particular act of parliament against papists: but this is no objection, *if the act of parliament creates precisely the same disabilities in respect to the Catholics which the common law had created in relation to aliens. For if their respective disabilities as to land be the same, a devise of lands to one, will receive precisely the same construction as a devise of lands to the other. The object of the statute of 11 & 12 Wm. III., ch. 4, was to render papists, aliens, in regard to lands in England. The stability of the government being supposed to depend upon this policy, "the design of the maker of this law," says Lord Chief Justice PARKER, "was, first, to get the lands of this kingdom out of the hands of papists." "And, secondly, to prevent them from making any new acquisition." 9 Mod. 191. The first object does not relate to aliens; but the second applies precisely to them, and the provisions of the act, as to papists, are substantially the same with those of the common law as to aliens. It is not, however, the disabilities of either which are to effect the construction of this devise: that construction is first to be made on the terms of the devise itself, and then, whatever legal consequence would result from the disability of the one, will equally result from that of the other. In *Roper* v. *Radcliffe*, it was held, that though lands devised to be absolutely sold for the payment of debts and legacies, were to be considered as money, so far as creditors and legatees were concerned, yet, as to the residuary devisee, they were to be considered as lands, because of his option to prevent the sale, by paying the debts and legacies, or his *option to have a decree for the sale of so much only as the debts and legacies should require; and it was determined in that case, that the *residuum* devised to the papists should be considered as land, and therefore, within the prohibition of the statute. The authority of this case has been repeatedly recognised in subsequent decisions, all of which concur to show, that though a devise of lands to be sold, is considered as personal estate, as to creditors and specific legatees, yet it is considered as land in respect to the heirs and residuary legatees. *Hill* v. *Filkins*, 2 P. Wms. 6; *Davers* v. *Dewes*, 3 Ibid. 46; *Carrick* v. *Fergus*, 2 Ibid, 362; 2 Bro. P. C. 412; 2 P. Wms. 4; *Attorney-General* v. *Lord Weymouth*, Ambl. 20; *King* v. *Inhabitants of Wivelingham*, 2 Doug. 737. And where none of it is wanting for the payment of debts and legacies, the whole may be retained as land. This doctrine is founded on the right of election, resulting from the devise. But no actual election need be made, to produce the legal effect; it is the same, though the parties are disabled to elect: they cannot defeat its operation, by electing to take as money; and where nothing is done, indicative of an election, the principle still operates.

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March 11th, 1818. WASHINGTON, Justice, delivered the opinion of the court.—The incapacity of an alien to take, and to hold beneficially, a legal

or equitable estate in real property, is not disputed by the counsel for the
*577] plaintiff; and it is admitted by the counsel for the state of *Virginia, that this incapacity does not extend to personal estate. The only inquiry, then, which this court has to make is, whether the above clause in the will of Robert Craig is to be construed, under all the circumstances of this case, as a bequest to Thomas Craig of personal property, or as a devise of the land itself?

Were this a new question, it would seem extremely difficult to raise a doubt respecting it. The common sense of mankind would determine, that a devise of money, the proceeds of land directed to be sold, is a devise of money, notwithstanding it is to arise out of land; and that a devise of land, which a testator by his will directs to be purchased, will pass an interest in the land itself, without regard to the character of the fund out of which the purchase is to be made. The settled doctrine of the courts of equity correspond with this obvious construction of wills, as well as of other instruments, whereby land is directed to be turned into money, or money into land, for the benefit of those for whose use the conversion is intended to be made. In the case of *Fletcher* v. *Ashburner* (1 Bro. C. C. 497), the Master of the Rolls says, that "nothing is better established than this principle, that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted, and this, in whatever manner the direction is given." He adds, "the owner of the fund, or the con-
*578] tracting parties, may make land money, or money *land. The cases establish this rule universally." This declaration is well warranted by the cases to which the Master of the Rolls refers, as well as by many others. (See *Doughty* v. *Bull*, 2 P. Wms. 320; *Yeates* v. *Compton*, Ibid. 358; *Trelawney* v. *Booth*, 2 Atk. 307.)

The principle upon which the whole of this doctrine is founded is, that a court of equity, regarding the substance, and not the mere forms and circumstances of agreements and other instruments, considered things directed or agreed to be done, as having been actually performed, where nothing has intervened which ought to prevent a performance. This qualification of the more concise and general rule, that equity considers that to be done which is agreed to be done, will comprehend the cases which come under this head of equity. Thus, where the whole beneficial interest in the money, in the one case, or in the land, in the other, belongs to the person for whose use it is given, a court of equity will not compel the trustee to execute the trust, against the wishes of the *cestui que trust*, but will permit him to take the money, on the land, if he elect to do so, before the conversion has actually been made; and this election he may make, as well by acts or declarations, clearly indicating a determination to that effect, as by application to a court of equity. It is this election, and not the mere right to make it, which changes the character of the estate, so as to make it real or personal, at the will of the party entitled to the beneficial interest.

*579] *If this election be not made, in time to stamp the property with a character different from that which the will or other instrument gives it, the latter accompanies it, with all its legal consequences, into the hands of those entitled to it in that character. So that, in case of the death of the *cestui que trust*, without having determined his election, the property

will pass to his heirs or personal representatives, in the same manner as it would have done, had the trust been executed, and the conversion actually made in his lifetime.

In the case of *Kirkman* v. *Mills* (13 Ves. 338), which was a devise of real estate to trustees, upon trust to sell, and the moneys arising, as well as the rents and profits till the sale, to be equally divided between the testator's three daughters, A., B. and C.; the estate was, upon the death of A., B. and C., considered and treated as personal property, notwithstanding the *cestuis que trust*, after the death of the testator, had entered upon, and occupied the land, for about two years prior to their deaths; but no steps had been taken by them, or by the trustees, to sell, nor had any requisition to that effect been made by the former to the latter. The Master of the Rolls was of opinion, that the occupation of the land for two years was too short to presume an election. He adds, "the opinion of Lord ROSSLYN, that property was to be taken as it happened to be at the death of the party from whom the representative claims, had been much doubted by Lord ELDON, who held, that without some act, it must be considered as being in the state in *which it ought to be; and the Lord ROSSLYN's rule was new, and not according to the prior cases. [*580

The same doctrine is laid down and maintained in the case of *Edwards* v. *The Countess of Warwick* (2 P. Wms. 171), which was a covenant, on marriage, to invest 10,000*l.*, part of the lady's fortune, in the purchase of land in fee, to be settled on the husband for life, remainder to his first and every other son in tail-male, remainder to the husband in fee. The only son of this marriage having died without issue, and intestate, and the investment of the money not having been made during his life, the Chancellor decided, that the money passed to the heir-at-law; that it was in the election of the son to have made this money, or to have disposed of it as such, and that, therefore, even his parol disposition of it would have been regarded; but that something to determine the election must be done.

This doctrine, so well established by the cases which have been referred to, and by many others which it is unnecessary to mention, seems to be conclusive upon the question which this court is called upon to decide, and would render any further investigation of it useless, were it not for the case of *Roper* v. *Radcliffe*, which was cited, and mainly relied upon, by the counsel for the state of Virginia. The short statement of that case is as follows: John Roper conveyed all his lands to trustees and their heirs, in trust, to sell the same, and out of the proceeds, and of the rents and profits till sale, to pay certain debts, and the overplus of the money to be paid as he, the said John Roper, by his will or otherwise *should appoint, and for want of such appointment, for the benefit of the said John Roper and [*581 his heirs. By his will, reciting the said deed, and the power reserved to him in the surplus of the said real estate, he bequeathed several pecuniary legacies, and then gave the residue of his real and personal estate to William Constable and Thomas Radcliffe, and two others, and to their heirs. By a codicil to this will, he bequeathed other pecuniary legacies; and the remainder, whether in lands or personal estate, he gave to the said W. C. and T. R. Upon a bill filed by W. C. and T. R. against the heir-at-law of John Roper, and the other trustees, praying to have the trust executed, and the residue of the money arising from the sale of the lands to be paid over to

them; the heir-at-law opposed the execution of the trust, and claimed the land as a resulting trust, upon the ground of the incapacity of Constable and Radcliffe to take, they being papists. The decree of the court of chancery, which was in favor of the papists, was, upon appeal to the house of lords, reversed, and the title of the heir-at-law sustained; six judges against five being in his favor.

Without stating at large the opinion upon which the reversal took place, this court will proceed, 1st. To examine the general principles laid down in that opinion; and then, 2d. The case itself, so far as it has been pressed upon us as an authority to rule the question before the court. In performing the first part of this undertaking, it will not be necessary to question any one
*582] of the premises laid down in that opinion. They are, *1. That land devised to trustees, to sell for payment of debts and legacies, is to be deemed as money. This is the general doctrine established by all the cases referred to in the preceding part of this opinion. 2. That the heir-at-law has a resulting trust in such land, so far as it is of value, after the debts and legacies are paid, and that he may come into equity and restrain the trustee from selling more than is necessary to pay the debt and legacies; or he may offer to pay them himself, and pray to have a conveyance of the part of the land not sold, in the first case, and the whole, in the latter, which property will, in either case, be land, and not money. This right to call for a conveyance is very correctly styled a privilege, and it is one which a court of equity will never refuse, unless there are strong reasons for refusing it. The whole of this doctrine proceeds upon a principle which is incontrovertible, that where the testator merely directs the real estate to be converted into money, for the purposes directed in his will, so much of the estate, or the money arising from it, as is not effectually disposed of by the will (whether it arise from some omission or defect in the will itself, or from any subsequent accident, which prevents the devise from taking effect), results to the heir-at-law, as the old use not disposed of.[1] Such was the case of *Crewe* v. *Bailey* (3 P. Wms. 20), where the testator having two sons, A. and B., and three daughters, devised his lands to be sold to pay his debts, &c., and as to the moneys arising by the sale, after debts paid, gave 200*l.* to A. the eldest son, at the age of 21, and the residue to his four younger children.
*583] A. died before *the age of 21, in consequence of which, the bequest to him failed to take effect. The court decided, that the 200*l.* should be considered as land, to descend to the heir-at-law of the testator, because it was, in effect, the same as if so much land as was of the value of 200*l.* was not directed to be sold, but was suffered to descend. The case of *Ackroyd* v. *Smithson* (1 Bro. C. C. 503) is one of the same kind, and establishes the same principle. So, likewise, a money provision, under a marriage contract, to arise out of land, which did not take effect, on account of the death of the party for whose benefit it was intended, before the time prescribed, resulted as money to the grantor, so as to pass under a residuary clause in his will. (*Hewitt* v. *Wright*, 1 Bro. C. C. 86.)

But even in cases of resulting trusts, for the benefit of the heir-at-law, it is settled, that if the intent of the testator appears to have been, to stamp upon the proceeds of the land described to be sold, the quality of

[1] Wilson v. Hamilton, 9 S. & R. 424; Wood v. Cone, 1 Paige 471.

personalty, not only to subserve the particular purposes of the will, but to all intents, the claim of the heir-at-law to a resulting trust is defeated, and the estate is considered to be personal. This was decided in the case of *Yeates* v. *Compton* (2 P. Wms. 308), in which the Chancellor says, that the intention of the will was to give away all from the heir, and to turn the land into personal estate, and that this was to be taken as it was at the testator's death, and ought not to be altered by any subsequent accident, and decreed the heir to join in the sale of the land, and the money arising therefrom to be *paid over as personal estate to the representatives of the annuitant, and to those of the residuary legatee. In the case of [*584
Fletcher v. *Ashburner*, before referred to, the suit was brought by the heir-at-law of the testator, against the personal representatives and the trustees claiming the estate, upon the ground of a resulting trust. But the court decreed the property, as money, to the personal representatives of him to whom the beneficial interest in the money was bequeathed, and the Master of the Rolls observes, that the cases of *Emblyn* v. *Freeman*, and *Crewe* v. *Bailey*, are those where real estate being directed to be sold, some part of the disposition has failed, and the thing devised has not accrued to the representative or devisee, by which something has resulted to the heir-at-law.

It is evident, therefore, from a view of the above cases, that the title of the heir to a resulting trust can never arise, except when something is left undisposed of, either by some defect in the will, or by some subsequent lapse, which prevents the devise from taking effect; and not even then, if it appears, that the intention of the testator was, to change the nature of the estate from land to money, absolutely and entirely, and not merely to serve the purposes of the will. But the ground upon which the title of the heir rests is, that whatever is not disposed of remains to him, and partakes of the old use, as if it had not been directed to be sold.

The third proposition laid down in the case of *Roper* v. *Radcliffe* is, that equity will extend the same privilege to the residuary legatee, which is allowed *to the heir, to pay the debts and legacies, and call for a conveyance of the real estate, or to restrain the trustees from selling [*585
more than is necessary to pay the debts and legacies. This has, in effect, been admitted in the preceding part of this opinion; because, if the *cestui que trust* of the whole beneficial interest in the money to arise from the sale of the land, may claim this privilege, it follows, necessarily, that the residuary legatee may, because he is, in effect, the beneficial owner of the whole, charged with the debts and legacies, from which he will be permitted to discharge it, by paying the debts and legacies, or may claim so much of the real estate as may not be necessary for that purpose.

But the court cannot accede to the conclusion, which, in *Roper* v. *Radcliffe*, is deduced from the establishment of the above principles. That conclusion is, that in respect to the residuary legatee, such a devise shall be deemed as land in equity, though in respect to the creditors and specific legatees, it is deemed as money. It is admitted, with this qualification, that, if the residuary legatee thinks proper to avail himself of the privilege of taking it as land, by making an election in his lifetime, the property will then assume the character of land. But if he does not make this election, the property retains its character of personalty, to every intent and purpose. The cases before cited seem to the court to be conclusive upon this point;

and none were referred to, or have come under the view of the court, which
*586] *sanction the conclusion made, in the unqualified terms used in the case of *Roper* v. *Radcliffe*.

As to the idea that the character of the estate is affected by this right of election, whether the right be claimed or not, it appears to be as repugnant to reason, as we think it has been shown to be, to principle and authorities. Before anything can be made of the proposition, it should be shown, that this right or privilege of election is so indissolubly united with the devise, as to constitute a part of it, and that it may be exercised in all cases, and under all circumstances. This was, indeed, contended for, with great ingenuity and ability, by the counsel for the state of Virginia, but it was not proved to the satisfaction of the court. It certainly is not true, that equity will extend this privilege in all cases to the *cestui que trust*. It will be refused, if he be an infant. In the case of *Seeley* v. *Jago* (1 P. Wms. 389), where money was devised, to be laid out in land in fee, to be settled on A., B. and C., and their heirs, equally to be divided: on the death of A., his infant heir, together with B. and C., filed their bill claiming to have the money, which was decreed accordingly as to B. and C.; but the share of the infant was ordered to be put out for his benefit, and the reason assigned was, that he was incapable of making an election, and that such election, if permitted, would, in case of his death, be prejudicial to his heir.

In the case of *Foone* v. *Blount* (Cowp. 467), Lord MANSFIELD, who is compelled to acknowledge the authority of *Roper* v. *Radcliffe* in parallel
*587] cases, *combats the reasoning of Chief Justice PARKER upon this doctrine of election, with irresistible force. He suggests, as the true answer to it, that though in a variety of cases, this right exists, yet it was inapplicable to the case of a person who was disabled by law from taking land, and that, therefore, a court of equity would, in such a case, decree that he should take the property as money.

The case of *Walker* v. *Denne* (2 Ves. jr. 170) seems to apply with great force to this part of our subject. The testator directed money to be laid out in lands, tenements and hereditaments, or on long terms, with limitations applicable to real estate. The money not having been laid out, the crown, on failure of heirs, claimed the money as land. It was decided, that the crown had no equity against the next of kin, to have the money laid out in real estate, in order to claim it by escheat. It was added, that the devisees, on becoming absolutely entitled, have the option given by the will; and a deed of appointment by one of the *cestuis que trust*, though a *feme covert*, was held a sufficient indication of her intention, that it should continue personal, against her heir, claiming it as ineffectually disposed of, for want of her examination. This case is peculiarly strong, from the circumstance, that the election is embodied in the devise itself; but this was not enough, because the crown had no equity to force an election to be made, for the purpose of producing an escheat.

Equity would surely proceed contrary to its regular course, and the principles which universally govern it, to allow the right of election, where
*588] it is desired, *and can be lawfully made, and yet refuse to decree the money, upon the application of the alien, upon no other reason, but because, by law, he is incapable to hold the land: in short, to consider him in the same situation as if he had made an election, which would have

been refused, had he asked for a conveyance. The more just and correct rule would seem to be, that where the *cestui que trust* is incapable to take or to hold the land beneficially, the right of election does not exist, and consequently, that the property is to be considered as being of that species into which it is directed to be converted.

Having made these observations upon the principles laid down in the case of *Roper* v. *Radcliffe*, and upon the arguments urged at the bar in support of them, very few words will suffice to show, that as an authority, it is inapplicable to this case. The incapacities of a papist, under the English statute of 11 & 12 Wm. III., c. 4, and of an alien at common law, are extremely dissimilar. The former is incapable to take by purchase, any lands or profits out of lands; and all estates, terms and any other interests or profits whatsoever out of lands, to be made, suffered or done, to or for the use of such person, or upon any trust for him, or to or for the benefit or relief of any such person, are declared by the statute to be utterly void. Thus, it appears, that he cannot even take. His incapacity is not confined to land, but to any profit, interest, benefit or relief, in or out of it. He is not only disabled from taking or having the benefit of any *such interest, but [*589
the will or deed itself, which attempts to pass it, is void. In *Roper* v. *Radcliffe*, it was strongly insisted, that the money given to the papist, which was to be the proceeds of the land, was a profit or interest out of the land. If this be so (and it is not material in this case to affirm or deny that position), then the will of John Roper in relation to the bequest to the two papists, was void under the statute; and if so, the right of the heir-at-law of the testator, to the residue, as a resulting trust, was incontestible. The cases above cited have fully established that principle. In that case, too, the rents and profits, till the sale, would have belonged to the papists, if they were capable of taking, which brought the case still more strongly within the statute; and this was much relied on, not only in reasoning upon the words, but the policy of the statute.

Now, what is the situation of an alien? He can not only take an interest in land, but a freehold interest in the land itself, and may hold it against all the world but the king, and even against him, until office found, and he is not accountable for the rents and profits previously received.(*a*) In this case, the will being valid, and the alien capable of taking under it, there can be no resulting trust to the heir, and the claim of the state is founded solely upon a supposed equity, to have the land by escheat, as if the alien had, or could, upon the principles of a court of equity, *have elected to take [*590
the land instead of the money. The points of difference between the two cases are so striking, that it would be a waste of time to notice them in detail.

It may be further observed, that the case of *Roper* v. *Radcliffe* has never, in England, been applied to the case of aliens; that its authority has been submitted to with reluctance, and is strictly confined in its application to cases precisely parallel to it. Lord MANSFIELD, in the case of *Foone* v. *Blount*, speaks of it with marked disapprobation; and we know, that had Lord TREVOR been present, and declared the opinion he had before entertained, the judges would have been equally divided.

(*a*) See Jackson, ex dem. State of New York, v. Clarke, *ante*, p. 12, n.

The case of the *Attorney-General* and *Lord Weymouth* (Ambler 20) was also pressed upon the court, as strongly supporting that of *Roper* v. *Radcliffe*, and as bearing upon the present case. The first of these propositions might be admitted; although it is certain, that the mortmain act, upon which that case was decided, is even stronger in its expression than the statute against papists, and the Chancellor so considers it; for, he says, whether the surplus be considered as money or land, it is just the same thing, the statute making void all charges and incumbrances on land, for the benefit of a charity. But if this case were, in all respects, the same as *Roper* v. *Radcliffe*, the observations which have been made upon the latter would all apply to it. It may be remarked, however, that in this case, the Chancellor avoids expressing any opinion upon the question, whether the
*591] money to arise from the sale of *the land, was to be taken as personalty or land; and, although he mentions the case of *Roper* v. *Radcliffe*, he adds, that he does not depend upon it, as it was immaterial, whether the surplus was to be considered as land or money, under the mortmain act.

Upon the whole, we are unanimously of opinion, that the legacy given to Thomas Craig, in the will of Robert Craig, is to be considered as a bequest of personal estate, which he is capable of taking for his own benefit.

Certificate accordingly.

Cameron *v.* McRoberts.

Decree.—Jurisdiction.

The circuit courts have no power to set aside their decrees in equity, on motion, after the term at which they are rendered.[1]

Where McR., a citizen of Kentucky, brought a suit in equity, in the circuit court of Kentucky, against C. C., stated to be a citizen of Virginia, and E. J. and S. E., without any designation of citizenship; all the defendants appeared and answered; and a decree was pronounced for the plaintiff: it was *held*, that if a join interest vested in C. C. and the other defendants, the court had no jurisdiction over the cause; but that if a distinct interest vested in C. C., so that substantial justice (so far as he was concerned) could be done, without affecting the other defendants, the jurisdiction of the court might be exercised as to him alone.

*592] Appeal from the Circuit Court for the district of Kentucky. *John McRoberts, stated in the pleadings to be a citizen of the state of Kentucky, brought his suit in equity, in the district court of Kentucky (said court then having by law the jurisdiction of a circuit court) against Charles Cameron, stated to be a citizen of Virginia, and Ephraim Jackson, Samuel Emerson, and other parties named in the bill, without any designation of citizenship. The defendant Cameron was not served with process, but appeared and answered the bill, as did the other defendants. The cause was heard, and at the November term of said court, in 1804, a final decree was pronounced for the plaintiff McRoberts.

In 1805, the defendant Cameron filed a bill of review, which is now pending, and at the May term of the circuit court of 1811, moved the court to set aside the decree, and to dismiss the suit, because the want of jurisdiction appeared on the record; and upon the allegation, that the said Jackson,

[1] McMicken *v.* Perin, 18 How. 507; Scott *v.* Blaine, Bald. 287; Brush *v.* Robbins, 3 McLean 486.

Emerson and the other parties to the bill, were, in fact, citizens of the state of Kentucky; on which motion, the following questions arose: 1st. Has the circuit court power and jurisdiction over a judgment or decree, so as to set the same aside, after the term at which it was pronounced? 2d. If it has, could it be exercised, after the lapse of five years? 3d. Had the district court jurisdiction of the cause as to the defendant Cameron and the other defendants? If not, had the court jurisdiction as to the defendant Cameron alone? *Upon which questions, the judges of the circuit court being divided in opinion, the same were ordered to be certified to this court. [*593

The cause was argued, at the last term, by *M. D. Hardin*, for the plaintiff, McRoberts; no counsel appearing for the defendant.

March 11th, 1818. At the present term of this court, it was ordered to be certified to the circuit court for the district of Kentucky as follows, viz:

CERTIFICATE.—This cause came on to be heard, on the statement of facts contained in the record, and on the questions on which the opinions of the judges of the circuit court were opposed, and which were, therefore, at the request of one of the parties, adjourned to this court, and was argued by counsel. On consideration whereof, this court doth order it to be certified to the circuit court of the United States for the district of Kentucky. 1st. That in this case, the court had not power over its decree, so as to set the same aside, on motion, after the expiration of the term in which it was rendered. 2d. Consequently, such power cannot be exercised after the lapse of five years. 3d. If a joint interest vested in Cameron and the other defendants, the court had no jurisdiction over the cause. If a distinct interest vested in Cameron, so that substantial justice (so far as he was interested) *could be done, without affecting the other defendants, the jurisdiction of the court might be exercised as to him alone. [*594

CRAIG *et al. v.* RADFORD.

Virginia land-law.—Purchase by alien.

If, under the Virginia land-law, the warrant must be lodged in the office of the surveyor, at the time when the survey is made, his certificate, stating that the survey was made by virtue of the governor's warrant, and agreeable to the royal proclamation of 1763, is sufficient evidence that the warrant was in his possession at that time.

The 6th section of the act of Virginia of 1748, entitled, "an act directing the duty of surveyors of lands," is merely directory to the officer, and does not make the validity of the survey depend upon his conforming to its requisitions.

A survey made by the deputy-surveyor is, in law, to be considered as made by the principal surveyor.

An alien may take, by purchase, a freehold estate, which cannot be divested on the ground of alienage, but by inquest of office, or some legislative act equivalent thereto.

A defeasible title, thus vested, during the war of the revolution, in a British born subject, who has never become a citizen, is completely protected and confirmed by the 9th article of the treaty of 1794, between the United States and Great Britain.

THIS cause was argued at the last term, by *M. D. Hardin* and *Talbot*, for the appellant, and by *B. Hardin*, for the respondent.

March 12th, 1818. WASHINGTON, Justice, delivered the opinion of *595] *the court.—This is an appeal from a decree of the Circuit Court for the district of Kentucky, made in a suit in chancery, instituted by the appellee, against the appellants, whereby the latter were decreed to convey to the former certain parts of a tract of land, granted to them by the Commonwealth of Virginia, to which the appellee claimed title, under a junior patent, founded on a prior warrant and survey.

The warrant to William Sutherland (under whom the appellee claims) bears date the 24th of January 1774, and was issued by ths governor of Virginia, by virtue of the proclamation of the king of Great Britain, of 1763. Under this warrant, 1000 acres of land, lying in Fincastle county, on the south side of the Ohio river, were surveyed, on the 4th day of May 1774, by Hancock Taylor, deputy-surveyor of that county, and a grant issued for the same, by the Commonwealth of Virginia, to the said William Sutherland, bearing date the 5th of August 1788. The appellee derives his title, as devisee under the will of his father, William Radford, to whom the said tract of land was conveyed, by William Sutherland, on the 13th of February 1799. The appellants claim parts of the aforesaid tract of land, under entries made upon treasury-warrants, in the year 1780, which were surveyed in 1785, and patented prior to the 26th of May 1788.

It is admitted by the parties, 1. That William Sutherland was a native subject of the king of Great Britain, and that he left Virginia, prior to the *596] year 1776, and has never since returned to the United *States. 2d. That Hancock Taylor was killed by the Indians, in 1774, and that he never did return the surveys made by him to the office of Preston, the principal surveyor of Fincastle county, but that A. Hemptonstrall, one of the company, took possession of his field-notes, after his death, and lodged them in Preston's office; and that it was Taylor's usual practice to mark all the corners of his surveys.

The correctness of the decree made in this cause is objected to on various grounds. 1st. Because it does not appear that Hancock Taylor had in his possession, or under his control, a warrant, authorizing him to execute

this survey for William Sutherland. 2d. Because there is not only an absence of all evidence to prove that the survey, for Sutherland, was made and completed on the ground, but that it appears, from the evidence of Hemptonstrall, that no such survey was actually made. This witness states, that he attended Hancock Taylor, on this survey, as a marker, and sometimes as a chain-carrier. He proves the beginning corner, and the first five lines of the survey, ending at four chestnut trees, the mark of which lines were plainly discernible, when this tract was surveyed, under an order of the circuit court, made in this cause. But he adds, that the subsequent lines of the survey were not run; and the surveyor who executed the order of the circuit court reports, that he met with no marked line, or corner trees, after he left the four chestnuts. 3d. It is objected, in the third place, that the survey, *not having been completed by the deputy-surveyor, the court ought to infer, that the lines actually run were merely experimental; and in [*597 such a case, it is contended, that the principal surveyor could not make, and certify a plan of the survey on which a grant could legally be founded.

It appears to the court, that these objections were fully examined and overruled in the case of *Taylor and Quarles* v. *Brown*, 5 Cranch 234. It was there decided, 1. That, if, in point of law, the warrant must be lodged in the office of the surveyor, at the time when the survey is made, his certificate, which states that the survey was made by virtue of the governor's warrant, and agreeable to his majesty's royal proclamation of 1763, is sufficient evidence that the warrant was in his possession at that time. In this case, the warrant, under which Sutherland's survey was made, is described in the certificate, with sufficient certainty to prove that the officer, in making the survey acted under its authority. 2. It was decided, that the 6th section of the act of Virginia, passed in the year 1748, entitled, "an act directing the duty of surveyors of lands," upon which the second objection made in that case, and in this, is founded, is merely directory to the officer, and that it does not make the validity of the survey to depend upon the conformity of the officer to its requisitions. This construction of the above section appears to the court to be perfectly well founded. The owner of the warrant has no power to control the conduct of the surveyor, whose duty it is to execute it, and it would therefore be unreasonable, to deprive him of *the [*598 title which the warrant confers upon him, on account of the subsequent neglect of that officer. If the omission of the surveyor to "see the land plainly bounded by natural bounds or marked trees," which the law imposes upon him as a duty, cannot affect the title of the warrant-holder, it would follow, that his omission to run all the lines of the survey on the ground, which the law does not in express terms require him to do, ought not to produce that effect. If the surveyor, by running some of the lines, and from adjoining surveys, natural boundaries, or his personal knowledge of the ground, is enabled to protract the remaining lines, so as to close the survey, no subsequent locator can impeach the title founded upon such survey, upon the ground, that all the lines were not run and marked. The legislature may undoubtedly declare all such surveys to be void; but no statute to this effect was in force in Virginia, at the time when this survey was made.

3. The third objection made to this decree appears to be substantially removed, by the opinion of this court, on the third point in the case above referred to. It was there decided, that the survey, though in fact made by

the deputy-surveyor, was, in point of law, to be considered as made by the principal, and consequently, that his signature to the plat and certificate was a sufficient authentication of the survey, to entitle the person claiming under it to a grant.

As to the distinction taken at the bar between that case and this, upon the ground that in this, the survey was merely experimental, and was not intended to be made in execution of the warrant, there is certainly *nothing
*599] in it. It is, by acts, that the intention of men, in the absence of positive declarations, can best be discovered. The survey made by Taylor was adopted by the principal surveyor, as one actually done in execution of the warrant to Sutherland, and it would be too much for this, or any other, court to presume, that a contrary intention prevailed in the mind either of the principal or deputy-surveyor, and on that supposition to pronounce the survey invalid.

The last objection made to this decree is, that as a British subject, William Sutherland could not make a legal title to this land, under the state of Virginia, and consequently, that the grant to him in 1788 was void, and was not protected by the treaty of 1794, between the United States and Great Britain. The decision of this court in the case of *Fairfax's devisee* v. *Hunter's lessee* (7 Cranch 603), affords a full answer to this objection. In that case, the will of Lord Fairfax took effect in the year 1781, during the war, and Denny Martin, the devisee under that will, was found to be a native-born British subject, who had never become a citizen of any of the United States, but had always resided in England. It was ruled in that case, 1st. That although the devisee was an alien enemy, at the time of the testator's death, yet he took an estate in fee, under the will, which could not, on the ground of alienage, be divested, but by inquest of office, or by some legislative act equivalent thereto. 2d. That the defeasible title thus vested in the
*600] alien devisee was completely *protected and comfirmed by the ninth article of the treaty of 1794. These principles are decisive of the objection now under consideration. In that case, as in this, the legal title vested in the alien, by purchase, during the war, and was not divested by any act of Virginia, prior to the treaty of 1794, which rendered their estates absolute and indefeasible.

Decree affirmed, with costs.

Ross *v.* Triplett.

Certificate of division.

This court has no jurisdiction of causes brought before it, upon a certificate of a division of opinion of the judges of the circuit court of the district of Columbia. The appellate jurisdiction of this court, in respect to that court, only extends to the final judgments and decrees of the latter.

This cause was brought from the Circuit Court for the district of Columbia, upon a certificate that the opinions of the judges of that court were divided upon a question which occurred in the cause, under the judiciary act of 1802, ch. 291, § 6. It was submitted without argument.

March 12th, 1818. It was ordered to be certified to the circuit court for the district of Columbia, as follows :

The Neptune.

*CERTIFICATE.—This cause came on to be heard on the transcript of the record of the circuit court for the district of Columbia, and on the question certified, on which the judges of that court were divided, and was argued by counsel. On consideration whereof, this court is of opinion, that its jurisdiction extends only to the final judgments and decrees of the said circuit court. It is, therefore, considered by this court, that the cause be remanded to the said circuit court for the district of Columbia, to be proceeded in according to law.

The NEPTUNE: HARROD *et al.*, Claimants.

Ships' registers.

Libel under the 27th section of the registry act of 1792, ch. 146, for the fraudulent use by a vessel of a certificate of registry, to the benefit of which she was not entitled. Vessels forfeited. The provisions of the 27th section apply as well to vessels which have not been previously registered, as to those to which registers have been previously granted.

APPEAL from the District Court of Louisiana.

February 26th, 1818. This cause was argued by *D. B. Ogden* and *C. J. Ingersoll*, for the appellants and claimants, and by the *Attorney-General*, for the United States.

*DUVALL, Justice, delivered the opinion of the court.—The ship Neptune, owned and commanded by Captain Myrick, arrived at New [*602 Orleans, from London, on the 20th of October 1815. On the next day, he appeared, in company with George M. Ogden, one of the appellants, at the custom-house, and reported the Neptune, as a registered vessel of the United States, belonging to Wilmington, North Carolina, where, he alleged, and it was so stated in the manifest, she was registered. He declared, at the same time, that he had lost the register, in ascending the Mississippi, and required a new one to be issued in lieu of it. Captain Myrick had made a protest before a notary-public to that effect, and offered to take the oath required by the 13th section of the act, entitled "an act concerning the registering and recording of ships or vessels," but was taken sick, and in a few days afterwards, died, without taking it.

George M. Ogden, administered on the estate of Captain Myrick, and on the 22d of November, the court of probates ordered a sale of the effects of the intestate, which was made on the 5th of December following, at which sale, Messrs. Harrod & Ogdens became the purchasers of the Neptune, for $7500.

On the 12th of January 1816, Messrs. Harrod & Ogdens addressed a letter to the collector, requesting to be informed, whether a register could be granted for the ship Neptune, on the owners taking the oath prescribed by law. The collector replied, by letter dated the 20th, that a register had been refused the ship Neptune, on the ground, that the oath offered to *show the loss of a former register was insufficient, inasmuch as it contained [*603 an assertion that the register lost was granted at the port of Wilmington, in North Carolina, and by a letter from the collector of that port, information had been received, that no such register was ever issued from his

office. The collector was afterwards examined as a witness in the cause, and declared on oath, to the same effect.

George M. Ogden, one of the owners, afterwards applied to the collector's office for a register, offering to take an oath, the form of which he had prepared, varying from the form of the oath required by law; he was informed by the collector, it was not sufficient, and that unless he would take the oath in the form prescribed by the registry act, a register could not be granted. Mr. Ogden pressed the form of the oath which he had tendered, but was again told, it could not be received. Mr. Ogden had been shown the letter from the collector at Wilmington, and had been informed of its contents, by the attorney for the district. Nevertheless, he appeared in the collector's office on the 22d of January 1816, and took the oath required by law, relying, as he said, on the oath which Captain Myrick had taken, as the ground of his oath; and a register issued in form to the owners, Richare Peniston, master. In this oath, he deposed, that "being owner in part and having in charge of the ship or vessel called the Neptune, the said ship or vessel had been, as he verily believed, registered according to law by the name of Neptune, and that a certificate thereof was granted by the collector
*604] of the district of Wilmington, in the state of *North Carolina, which certificate had been lost and destroyed, by accidentally falling overboard in the river Mississippi."

On the part of the owners, John McCauley, mate of the Neptune, deposed, that on her voyage from London to New Orleans, he had seen the register of the ship Neptune, frequently, and before the issuing of the new register, he had assured Mr. Ogden he had seen it, and that he believed it to be dated, at Wilmington, North Carolina, and that it was lost, by accident, from the pocket of the master in the river Mississippi; and that he had no reason to doubt it a genuine one. McCauley, being asked, "Did Captain Myrick tell you, on his return from town, that he had shown the register to Messrs. Harrod & Ogdens?" answered, he said, he had laid the pocket-book containing it on the desk. The carpenters, who repaired the Neptune, certified that, in their opinion, she was built in the United States.

The Neptune cleared out at the custom-house of New Orleans, on the 9th day of February 1816, when she was immediately seized by the collector, as forfeited to the United States, and libelled for a breach of the 27th section of the act of congress of the 31st of December, 1792, ch. 146, entitled, "an act concerning the registering and recording of ships or vessels." Upon these facts, the Neptune, together with her tackle, apparel and furniture, was, by the sentence of the district court, condemned as forfeited to the United States. From this decree, the owners appealed to this court.

*605] *The question for the decision of this court must depend upon the true construction of the act before mentioned. If the appellants have, in all respects, complied with the requisites of that act, they have incurred no forfeiture; if any of its provisions, which inflict a forfeiture of the vessel for a non-compliance, have been violated, a forfeiture will ensue.

By the first section of the act, it is provided, that ships or vessels of the United States shall not continue to enjoy the benefits and privileges appertaining to such ships or vessels, longer than they shall continue to be wholly owned, and be commanded by a citizen or citizens of the United States. The third section directs, that all vessels, thereafter to be registered, shall

be registered by the collector of the district, in which shall be comprehended the port to which the ship or vessel shall belong, at the time of her registry; which port shall be deemed to be that at or nearest to which the owner, if there be but one, or if more than one, the husband, or acting and managing owner, of such ship or vessel usually resides; and the name of the vessel, and of the port to which she belongs, shall be painted on her stern. The fourth section prescribes the substance of the oath to be taken, in order to the registry, and contains a clause of forfeiture, in case of any of the matters of fact, which shall be within the knowledge of the party swearing, shall not be true. The fifth section makes it the duty of all the owners, resident within the United States, to take a like oath, within ninety days after the granting the register. *The ninth section directs the collector of each district to keep a record of all ships and vessels to [*606 which registers shall have been granted, and prescribes the form of the register. The tenth section directs a copy of each register to be transmitted to the register of the treasury, who shall cause a record of them to be kept. The eleventh section directs the course of proceeding, in case a vessel be purchased by a citizen, before registry, and contains a clause of forfeiture, in case of false swearing. By the thirteenth section, it is enacted, that if the certificate of registry of any vessel shall be lost, destroyed or mislaid, the master, or other person having the charge or command of her, may make oath or affirmation, before the collector of the district, where such vessel shall first be, after such a loss or destruction; and the form of the oath is prescribed. It is an essential part of the oath, that in it shall be stated the name of the collector, and the port at which the former register was granted. The fourteenth section requires, that when a registered vessel shall be sold or transferred to a citizen of the United States, she shall be registered anew, by her former name; and if not registered anew, she shall not be entitled to the privileges or benefits of a ship of the United States. By the twenty-seventh section, it is provided, that if any certificate of registry or record shall be fraudulently or knowingly used for any ship or vessel, not then actually entitled to the benefit thereof, according to the true intent of the act, such ship or vessel shall *be forfeited to the United States, with her [*607 tackle, apparel and furniture.

In the argument of this case, it was admitted by the counsel for the appellants, that the register was improperly obtained, but it was denied, that the vessel became thereby forfeited, under the 27th, or any other section of the registry act. And it was contended, that the owner having a register issued by the collector, was proof that it was not fraudulently obtained. In support of this position, the case of *The Anthony Mangin* was cited from 3 Cranch 337. To this it was replied, that the appellants purchased the Neptune, knowing that she was without a register. That it was alleged to have been granted to the former owner, by the collector for the port of Wilmington, in North Carolina, and that it was lost. The appellants knew that information had been received from the collector at Wilmington, that a register for the Neptune had never been issued at that port; and that, therefore, it was fraudulently obtained, and used for the Neptune, not then entitled to the benefit of it.

The case of *The Anthony Mangin* does not support the argument of the appellant's counsel. In that case, an action was brought by the United States

against Grundy and Thornburgh, for money had and received for the use of the United States, by the defendants, as assignees of Aquila Brown, junior, a bankrupt, it being money received by the defendants for the sale of the ship Anthony Mangin, which ship the United States alleged was forfeited by
*608] reason *that Brown, in order to obtain a register for her, as a ship of the United States, had falsely sworn that she was his sole property, when he knew that she was in part owned by an alien. There was no proceeding *in rem* against the vessel. It was a suit against the assignees of Brown, for the value of the vessel; and the court decided, that an action for the value could only be supported against the person who had taken the oath.

It is evident, from the facts in this case, that George M. Ogden, when he applied for a register for the Neptune, did not believe that he could with safety take the oath required by law; because he had prepared an oath, varying in form from the oath required, which he pressed the collector to be permitted to take, but which the collector refused to administer. And the collector was of opinion, until he consulted the district-attorney, that he ought not to be permitted to take the oath prescribed, as he could not do it, without swearing to a fact which was known to be untrue. For this reason, he refused to administer the oath to Captain Myrick, in his lifetime.

There are strong grounds for the belief, that the Neptune never had a genuine register. She is represented in the manifest to have been built at Boston, to be owned by Captain Myrick, of New York, and that she belonged to the port of Wilmington, in North Carolina. If she had been built at Boston, and belonged at the time to a person residing in New York, it is more than probable, that, pursuant to the provisions of the third section of the act, she would have been registered at one of those places. If Captain
*609] *Myrick, or the present owners, had been desirous of obtaining correct information on the subject, it would have been furnished, on application to the treasury department. All registers are transmitted regularly to the register of the treasury, to be registered in his office.

It should be recollected, that the mate of the Neptune testified, that Captain Myrick, after returning from the house of Messrs. Harrod & Ogdens to his vessel, said, he had left his pocket-book containing the register on their desk. Hence, it is rational to conclude, either that Captain Myrick had no register, or that if he had one, it would not bear inspection.

Upon the whole, the court are of opinion, that the register was fraudulently and knowingly used for the Neptune, when she was not entitled to the benefit of it; and that she is forfeited for a violation of the provisions of the 27th section of the registry act; and that the provisions of that section apply as well to vessels which have not been previously registered, as to those to which registers have been previously granted.

Decree affirmed.

Decree.—This cause came on to be heard, on the transcript of the record, and was argued by counsel; on consideration whereof, it is decreed and ordered, that the decree of the district court of Louisiana in this case be, and the same is hereby affirmed, with costs and damages at the rate of
*610] six *per centum* *per *annum*, including interest on the amount of the appraised value of the said ship Neptune, to be computed from the date of the decree of the said district court.

UNITED STATES *v.* PALMER *et al.*

Piracy.—New states.

A robbery committed on the high seas, although such robbery, if committed on land, would not, by the laws of the United States, be punishable with death, is piracy, under the 8th section of the act of 1790, ch. 36, for the punishment for certain crimes against the United States; and the circuit courts have jurisdiction thereof.[1]

The crime of robbery, as mentioned in the act, is the crime of robbery as recognised and defined at common law.

The crime of robbery, committed by a person, who is not a citizen of the United States, on the high seas, on board of a ship belonging exclusively to subjects of a foreign state, is not piracy under the act, and is not punishable in the courts of the United States.

When a civil war rages in a foreign nation, one part of which separates itself from the old established government, and erects itself into a distinct government, the courts of the Union must view such newly-constituted government, as it is viewed by the legislative and executive departments of the government of the United States.

If that government remains neutral, but recognises the existence of a civil war, the courts of the Union cannot consider as criminal, those acts of hostility which war authorises, and which the new government may direct against its enemy.

The same testimony which would be sufficient to prove that a vessel or person is in the service of an acknowledged state, is admissible to prove that they are in the service of such newly-erected government. Its seal cannot be allowed to prove itself, but may be proved by such testimony as the nature of the case admits; and the fact that a vessel or person is in the service of such government may be established otherwise, should it be impracticable to prove the seal.[2]

THIS case was certified from the Circuit Court for the Massachusetts district. *At the circuit court of the United States, for the first circuit, begun and holden at Boston, within and for the Massachusetts district, on Wednesday, the 15th day of October, in the year of our Lord 1817, before the Honorable Joseph Story, associate justice, and John Davis, district judge. The jurors of the United States of America, within and for the district aforesaid, upon their oaths, do present, that John Palmer and Thomas Wilson, both late of Boston, in the district aforesaid, mariners, and Barney Calloghan, late of Newburyport, in the aforesaid district, mariner, with force and arms, upon the high seas, out of the jurisdiction of any particular state, on the fourth day of July now last past, did piratically and feloniously set upon, board, break and enter a certain ship called the Industria Raffaelli, then and there being a ship of certain persons (to the jurors aforesaid unknown), and then and there, piratically and feloniously, did make an assault in and upon certain persons, being mariners, subjects of the king of Spain, whose names to the jurors aforesaid are unknown, in the same ship, in the peace of God, and of the said United States of America, then and there being, and then there, piratically and feloniously, did put the aforesaid persons, mariners of the same ship, in the ship aforesaid then being, in corporal fear and danger of their lives, then and there, in the ship aforesaid, upon the high seas aforesaid, and out of the jurisdiction of any particular state, as aforesaid, and piratically and feloniously did, then and there, steal, take and carry away *500 boxes of sugar, of the value of $20,000 of lawful money of the said United States; 60 pipes of rum, of the value of $6000; 200 demijohns of honey, of the value of $1000; 1000 hides, of the value of $3000; ten hogsheads of [*611 [*612

[1] United States *v.* Jones, 3 W. C. C. 209; United States *v.* Hutchings, Id. 543. United States *v.* Perez, 2 Wh. Cr. Cas. 96; [2] The Estrella, 4 Wheat. 298.

coffee, of the value of $2000; and four bags of silver and gold, of the value of $60,000, of the like lawful money of the said United States of America, the goods and chattels of certain persons (to the jurors aforesaid unknown), then and there, upon the high seas aforesaid, and out of the jurisdiction of any particular state, being found in the aforesaid ship, in custody and possession of the said mariners in the said ship, from the said mariners of the same ship, and from their custody and possession, then and there, upon the high seas aforesaid, out of the jurisdiction of any particular state, as aforesaid; against the peace and dignity of the said United States, and the form of the statute of the United States, in such case made and provided. And the jurors aforesaid, upon their oath aforesaid, do further present, that the aforesaid district of Massachusetts is the district where the offenders aforesaid were first apprehended for the said offence.

To which indictment, the prisoners pleaded not guilty, and upon the trial, the following questions occurred, upon which the opinions of the said judges of the circuit court were opposed:

1st. Whether a robbery, committed upon the high seas, although such robbery, if committed upon land, would not, by the laws of the United States, be punishable *with death, is piracy, under the 8th section of the act of congress, passed the 30th of April, A. D. 1790; and whether the circuit court of the United States hath authority to take cognisance of, try and punish such offence?

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2d. Whether the crime of robbery, mentioned in the said 8th section of the act of congress aforesaid, is the crime of robbery, as recognised and defined at common law, or is dispunishable, until it is defined and expressly punished by some act of congress, other than the act of congress above mentioned?

3d. Whether the crime of robbery, committed by persons who are not citizens of the United States, on the high seas, on board of any ship or vessel, belonging exclusively to the subjects of any foreign state or sovereignty, or upon the person of any subject of any foreign state or sovereignty, not on board of any ship or vessel belonging to any citizen or citizens of the United States, be a robbery or piracy, within the true intent and meaning of the said 8th section of the act of congress aforesaid, and of which the circuit court of the United States hath cognisance, to hear, try, determine and punish the same?

4th. Whether the crime of robbery, committed on the high seas, by citizens of the United States, on board of any ship or vessel, not belonging to the United States, or to any citizens of the United States, in whole or in part, but owned by, and exclusively belonging to, the subjects of a foreign state or sovereignty, or committed on the high seas, on the person of any subject of any foreign state or sovereignty, who is not, at the time, on board of any *ship or vessel, belonging in whole or part to the United States, or to any citizen thereof, be a robbery or piracy, within the said 8th section of the acts of congress aforesaid, and of which the circuit court of the United States hath cognisance to hear, try, and determine and punish the same?

*614]

5th. Whether any revolted colony, district or people, which have thrown off their allegiance to their mother country, but have never been acknowledged by the United States, as a sovereign or independent nation or power,

have authority to issue commissions to make captures on the high seas, of the persons, property and vessels of the subjects of the mother country, who retain their allegiance; and whether the captures made under such commissions are, as to the United States, to be deemed lawful; and whether the forcible seizure, with violence, and by putting in fear of the persons on board of the vessels, the property of the subjects of such mother country, who retain their allegiance, on the high seas, in virtue of such commissions, is not to be deemed a robbery or piracy, within the said 8th section of the act of congress aforesaid?

6th. Whether an act, which would be deemed a robbery on the high seas, if done without a lawful commission, is protected from being considered as a robbery on the high seas, when the same act is done under a commission, or the color of a commission, from any foreign colony, district or people, which have revolted from their native allegiance, and have declared themselves independent and sovereign, and *have assumed to exercise the powers and authorities of an independent and sovereign government, [*615 but have never been acknowledged or recognised as an independent or sovereign government or nation, by the United States, or by any other foreign state, prince or sovereignty?

7th. Whether the existence of a commission to make captures, where it is set up as a defence to an indictment for piracy, must be proved by the production of the original commission, or of a certified copy thereof, from the proper department of the foreign state or sovereignty by whom it is granted; or if not, whether the impossibility of producing either the original or such certified copy, must not be proved, before any inferior and secondary evidence of the existence of such commission is to be allowed, on the trial of such indictment before any court of the United States?

8th. Whether a seal, purporting to be the seal of a foreign state or sovereignty, and annexed to any such commission, or a certified copy thereof, is to be admitted, in a court of the United States, as proving itself, without any other proof of its genuineness, so as to establish the legal existence of such commission from such foreign state or sovereignty?

9th. Whether a seal, annexed to any such commission, purporting to be the public seal used by the persons exercising the powers of government in any foreign colony, district or people, which have revolted from their native allegiance, and have declared themselves independent and sovereign, and actually exercise the powers of an independent government *or nation, but have never been acknowledged as such independent [*616 government or nation by the United States, is admissible in a court of the United States, as proof of the legal existence of such commission, with or without further proof of the genuineness of such seal?

10th. Whether any colony, district or people, who have revolted from their native allegiance, and have assumed upon themselves the exercise of independent and sovereign power, can be deemed, in any court of the United States, an independent or sovereign nation or government, until they have been acknowledged as such by the government of the United States; and whether such acknowledgment can be proved, in a court of the United States, otherwise than by some act, or statute or resolution of the congress of the United States, or by some public proclamation, or other public act of the executive authority of the United States, directly containing or announcing

such acknowledgment, or by publicly receiving and acknowledging an ambassador, or other public minister, from such colony, district or people; and whether such acknowledgment can be proved by mere inference, from the private acts or private instructions of the executive of the United States, when no public acknowledgment has ever been made; and whether the courts of the United States are bound judicially to take notice of the existing relations of the United States, as to foreign states and sovereignties, their colonies and dependencies?

11th. Whether, in case of a civil war between a mother country and its colony, the subjects of the different parties are to be deemed, in respect to *617] neutral *nations, as enemies to each other, entitled to the rights of war; and that captures made of each other's ships and other property, on the high seas, are to be considered, in respect to neutral nations, as rightful, so that courts of law of neutral nations are not authorized to deem such acts as piracy?

And the said judges, being so opposed in opinion upon the questions aforesaid, the same were, then and there, at the request of the district-attorney for the United States, stated, under the direction of the judges, and ordered by the court to be certified, under the seal of the court, to the supreme court, at their next session to be held thereafter, to be finally decided by said supreme court; and the court being further of opinion, that further proceedings could not be had in said cause, without prejudice to the merits of the same cause, did order, that the jury impannelled as aforesaid to try said cause, be discharged from giving any verdict therein.

March 13th. *Blake*, for the United States, argued: 1. That a robbery committed on the high seas, is piracy, under the 8th section of the act of 1790, ch. 36, "for the punishment of certain crimes against the United States," although no law of the United States be subsisting for the punishment of the same offence, if committed on land; and that such piracy is cognisable in the circuit court. The words of the statute are, "that if any person or persons shall commit, upon the high seas," &c., "murder or robbery, or any other offence, which, if committed within the body of a county, would, by *618] the laws of the United States, be punishable *with death," &c., "every such offender shall be deemed, taken and adjudged to be a pirate and felon, and being thereof convicted, shall suffer death," &c. The relative pronoun "which," does not relate back to the first specified offences of "murder or robbery," but refers only to its immediate antecedent, "any other offence." It is this last class of crimes only that must be punishable, by the laws of the United States, with death, if committed within the body of a county, in order to constitute them piracies, when committed on the high seas. It is a mistaken principle, commonly applied to penal statutes, that they are to be construed strictly. Sir William Jones has laid down the true rule, that criminal laws are to be construed liberally as to the offence, and strictly as to the offender. Life of Sir W. Jones, p. 268. A strong illustration of the good sense of this rule, is to be found in the construction which has been given in England to the stabbing act. Foster's Cr. Law 297. A contrary construction of the statute now under consideration, would render it wholly inoperative, until there shall be a law of the United States, for the punishment of robbery committed in the body of a county; which

will never happen, as the United States have no constitutional authority to punish a robbery committed within the body of a county. Forts, arsenals, dock-yards, &c., "under the sole and exclusive jurisdiction of the United States," cannot be said to be within the body of a county. It may be admitted, that there is some degree of looseness in the phraseology *of this section, which was evidently copied from the British statute of [*619 the 39 Geo. III., ch. 37, relative to the same subject, without regarding the difference between the constitutions of the two countries. On the construction of the British statute, it would be perfectly immaterial, whether the pronoun "which" was carried back to the words "murder and robbery," or whether it was confined to its immediate antecedent; because, in England, murder and robbery are punishable with death, when committed in the body of a county, under the same laws which constitute them piracies, when committed on the high seas. But such a construction of our statute would render it wholly inoperative, as to the great offences of murder and robbery, which are not, and cannot be made punishable under the laws of the United States, when committed within the body of a county. Nor can it be objected, that by the construction now contended for, the words "any other offence," would be equally inoperative; because there are various offences which would still be reached by the statute, such as treason, &c., for the punishment of which congress may provide, though committed within the body of a county. It follows, as a corollary, that the circuit court has cognisance of these offences; for, by the judiciary act of 1789, ch. 20, § 11, it has cognisance of "all crimes and offences cognisable under the authority of the United States."

2. The crime of robbery mentioned in the 8th section of the act of 1790, is the crime of robbery, as understood at common law. A piracy or felony on the high seas is sufficiently defined, by terming it a robbery committed on the high seas. *The import of the term "robbery," must be [*620 sought in the common law, in the same manner as the import of the terms murder, manslaughter, rescous, benefit of clergy, and many others that are used in the criminal code of the United States.

3. If the robbery in question amount to piracy, by the law of nations, the word "any person or persons," in the 8th section, will embrace the subjects of all nations, who may commit that offence, on the high seas, whether on board a foreign vessel, or a vessel belonging to citizens of the United States. A felony, which is made a piracy by municipal statutes, and was not such by the law of nations, cannot be tried by the courts of the United States, if committed by a foreigner, on board a foreign vessel, on the high seas; because the jurisdiction of the United States, beyond their own territorial limits, only extends to the punishment of crimes, which are piracy by the law of nations. But it is the right and the duty of the United States, as a member of the community of nations, to punish offences committed on the high seas, against the law of nations. 4 Bl. Com. 71. By this statute, congress have exercised this power, which is also conferred on them by the constitution. The offence of piracy, which is imperfectly defined by the law of nations, is declared to be murder or robbery, committed on the high seas, or in any river, &c., out of the jurisdiction of any particular state: and is made punishable with death. Congress cannot be presumed to have neglected so important a duty, as that of defining and punishing

the offence of general piracy. *Without this statute, there can be found no definition and punishment of it; because the law of nations merely creates the offence, and the common law and statute 28 Hen. VIII., ch. 15, may perhaps not be considered as in force in the United States.

4. The crime of robbery, committed by a citizen of the United States, on the high seas, on board a foreign vessel, or on the person of a foreigner, must be considered as a piracy, under the 8th section of the act; because the jurisdiction of a nation extends to its citizens, wheresoever they may be, except within the territory of a foreign sovereign. 2 Ruth. Inst. 180; Vattel, lib. 2, ch. 6. The jurisdiction of a nation over its public ships is exclusive everywhere; but it is not exclusive over merchant vessels belonging to its subjects. It is there concurrent with the personal jurisdiction of other nations over their citizens. Consequently, the personal jurisdiction of the United States over their citizens extends to offences committed by them, on board of foreign merchant vessels, on the high seas.

5. The general principle applied by the writers on the law of nations to the case of a civil war, considers the war (as between the conflicting parties), as just on both sides, and that each is to treat the other as a public enemy, according to the established usages of war. Vattel, lib. 3, ch. 18, § 296. So also, it is the duty of other nations, to remain neutral, and not to interfere with the exercise of complete belligerent rights by both parties, within the territory which is the scene of their hostilities. But this does not imply a *622] *right on their part to push their wars on to the ocean, and to annoy the rest of the world, on this common highway of nations. The generality of the expressions used by Vattel on this subject may, indeed, seem to import such a right. But it should be remembered, that, with all his merit, he is very deficient in precision, and on this question, peculiarly unsatisfactory. The maritime rights of a belligerent power must be perfect, or they cannot exist at all. They must, therefore, include the right of visitation and search, and of detaining for adjudication; and of punishing a resistance to the exercise of these rights, by the appropriate penalty of confiscation. So that neutral nations may come to be affected in their most valuable interests, by a mere domestic quarrel, which never ought to have been extended beyond the territory of the people where it originated. This renders it indispensable to inquire, how far neutral nations are bound to submit to the exercise of these high prerogatives of sovereignty, in a civil war, under color of a commission from one of the belligerent parties, whose independence has not been acknowledged by any power. The right of an insurgent people to be treated by the parent state, against which it revolts, with all the humanity and moderation which are required in any other war, and the duty of neutral nations to abstain from interfering in the contest, are not denied. But the right of the new people to thrust themselves into the family of nations, and to make the ocean the theatre of their predatory hostilities, without the consent of other nations, is denied. Such a right can *623] only be founded *upon a perfect title to sovereignty, which cannot exist, in a case where the very object of the war is, to decide whether the claim of the former sovereign, or of the revolted people shall prevail. This title cannot be taken notice of by courts of justice, until it has been recognised by the government of the country under whose authority they sit. *Rose* v. *Himely*, 4 Cranch 292; *Gelston* v. *Hoyt* (*ante*, p. 324).

6. If, then, a revolted colony or people, whose independence has not been recognised by the government of the United States, have no authority to issue a commission to make captures on the high seas, which can be considered as valid in the courts of the United States, a capture under such a commission is, in no respect, distinguishable from a capture without any commission. A privateer, cruising under two commissions from different sovereigns, is a pirate. 2 Sir L. Jenkins' Life, 714; Ord. de la Mar. tit. 3, tit. 9, art. 3; Martens on Privateers 44. In the case of the famous pirate *Kydd*, 2 State Trials 314, the indictment was for general piracy. He had two commissions, one against the French, the other against certain pirates, which he produced in his justification. But Lord Chief Baron WARD said, "If he had acted pursuant to his commission, he ought to have condemned ship and goods, if they were French; but by his not condemning, he seems to show his aim, mind and intention, and that he did not act, in that case, by virtue of his commission, but quite contrary to it. Whilst *men pursue their commissions, they must be justified; but when they do [*624 things not authorized, or never intended by them, it is as if they had no commission." This principle, that where the criminal intention is apparent, the quality of the act will not be changed, by its having been committed under color of legal authority, is illustrated by all the analogies of criminal law. 2 East P. C. 660; Foster Cr. Law 135, 154, 312.

7. The established rules of evidence ought not to be dispensed with, in the proof of an authority to capture, where that authority is set up as a defence to an indictment for piracy. All civilized nations have departments and offices, in which the commissions issued to their cruisers are registered; the original is borne about with him by the cruiser, as his authority to search, to detain and to capture; a copy of it may always be readily obtained by application at the proper office. The impossibility of producing the original, or an examined copy of such a commission, is, therefore, an inadmissible supposition. The rule of evidence which requires that it should be produced, is inflexible, and is founded upon the reasonable suspicion, excited by a resort to inferior testimony, that there must be some fatal defect in the original document.

8. There can be no doubt, that the seal of a recognised foreign state or sovereignty, is to be admitted, as proving itself, without other proof of its genuineness. But the seal of a new people or state is not sufficiently notorious to prove itself, and to give credit to it, would be to recognise the sovereign from whom it emanates, which courts of justice are not [*625 *competent to do.

9. The ninth question certified from the court below has been already answered.

10. The first branch of the tenth question has been before answered by this court, in the cases already cited. *Rose* v. *Himely*, 4 Cranch 292; *Gelston* v. *Hoyt* (*ante*, p. 324). The second branch of this question presupposes that no distinct acknowledgment of the new state has been made by the United States, since it excludes from consideration any public act of recognition by the legislative and executive departments, and confines itself to the mere private acts and instructions of the executive. On a subject of such importance as a change in the foreign relations of the country, nothing but the most explicit, public and notorious acts of the government

should be noticed by courts of justice. Nothing should be left to inference and conjecture; because, such a course might lead to a usurpation by the courts, of the high prerogative of making war and peace, and the whole nation would become responsible to other nations for the error of judgment in a department with which it had not intrusted the care of its foreign affairs. In the infinite variety and complication of these affairs, the language and conduct of the executive may be misunderstood; and therefore, nothing short of an act of the whole legislature, a treaty, a proclamation of the president, or the public reception of an ambassador from the new state, ought to be considered as a recognition of its independence.

*626] 11. The eleventh *question is involved in the discussion of the preceding.

No counsel appeared to argue the cause for the prisoners.

March 14th, 1818. MARSHALL, Ch. J., delivered the opinion of the court. —In this case, a series of questions has been proposed by the circuit court of the United States for the district of Massachusetts, on which the judges of that court were divided in opinion. The questions occurred on the trial of John Palmer, Thomas Wilson and Barney Calloghan, who were indicted for piracy committed on the high seas.

The first four questions relate to the construction of the 8th section of the "act for the punishment of certain crimes against the United States." The remaining seven questions respect the rights of a colony or other portion of an established empire, which has proclaimed itself an independent nation, and is asserting and maintaining its claim to independence by arms.

The 8th section of the act on which these prisoners were indicted is in these words: "And be it enacted, that if any person or persons shall commit, upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular state, murder or robbery, or any other offence, which, if committed within the body of a county, would, by the laws of the United States, be punishable with death; or if any captain or mariner of any ship or other vessel, shall, piratically and feloniously, run away with *627] such ship or vessel, or any goods or *merchandise, to the value of fifty dollars, or yield up such ship or vessel voluntarily to any pirate; or if any seaman shall lay violent hands upon his commander, thereby to hinder and prevent his fighting in defence of his ship, or goods committed to his trust, or shall make a revolt in the ship; every such offender shall be deemed, taken and adjudged to be a pirate and felon, and being thereof convicted, shall suffer death; and the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular state, shall be in the district where the offender is apprehended, or into which he may first be brought."

Robbery committed on land, not being punishable by the laws of the United States with death, it is doubted, whether it is made piracy by this act, when committed on the high seas. The argument is understood to be, that congress did not intend to make that a capital offence on the high seas, which is not a capital offence on land. That only such murder, and such robbery, and such other offence as, if committed within the body of a county, would, by laws of the United States, be punishable with death, is made

piracy. That the word "other" is without use or meaning, if this construction be rejected. That it so connects murder and robbery with the following member of the sentence, as to limit the words "murder and robbery" to that description of those offences which might be made punishable with death, if committed on land. That in consequence of this word, the relative "which" has for its antecedent the whole preceding part of the sentence, and not the words "other offences." That section *consists of three distinct classes of piracy. The first, of offences, which if committed within the body of a county, would be punishable with death. The second and third, of particular offences which are enumerated. [*628

This argument is entitled to great respect on every account; and to the more, because, in expounding a law which inflicts capital punishment, no over-rigid construction ought to be admitted. But the court cannot assent to its correctness. The legislature, having specified murder and robbery particularly, are understood to indicate clearly the intention that those offences shall amount to piracy; there could be no other motive for specifying them. The subsequent words do not appear to be employed for the purpose of limiting piratical murder and robbery, to that description of those offences which is punishable with death, if committed on land, but for the purpose of adding other offences, should there be any, which were not particularly recited, and which were rendered capital by the laws of the United States, if committed within the body of a county. Had the intention of congress been, to render the crime of piracy dependent on the punishment affixed to the same offence, if committed on land, this intention must have been expressed in very different terms from those which have been selected. Instead of enumerating murder and robbery, as crimes which should constitute piracy, and then proceeding to use a general term, comprehending other offences, the language of the legislature would have been, that "any offence" committed on the high seas, which, if *committed in the body of a county, would be punishable with death, should amount to piracy. [*629

The particular crimes enumerated were, undoubtedly, first in the mind of congress. No other motive for the enumeration can be assigned. Yet, on the construction contended for, robbery on the high seas would escape unpunished. It is not pretended, that the words of the legislature ought to be strained beyond their natural meaning, for the purpose of embracing a crime which would otherwise escape with impunity; but when the words of a statute, in their most obvious sense, comprehend an offence, which offence is apparently placed by the legislature in the highest class of crimes, it furnishes an additional motive for rejecting a construction, narrowing the plain meaning of the words, that such construction would leave the crime entirely unpunished.

The correctness of this exposition of the 8th section is confirmed by those which follow. The 9th punishes those citizens of the United States who commit the offences described in the 8th, under color of a commission or authority derived from a foreign state. Here, robbery is again particularly specified. The 10th section extends the punishment of death to accessories before the fact. They are described to be those who aid, assist, advise, &c., any person to "commit any murder, robbery, or other piracy aforesaid." If the word "aforesaid" be connected with "murder" and "robbery," as

well as with "other piracy," yet it seems difficult to resist the *conviction, that the legislature considered murder and robbery as acts of piracy. The 11th section punishes accessories after the fact. They are those who, "after any murder, felony, robbery, or other piracy whatsoever, aforesaid," shall have been committed, shall furnish aid to those by whom the crime has been perpetrated. Can it be doubted, that the legislature considered murder, felony and robbery, committed on the high seas, as piracies?

If it be answered, that although this opinion was entertained, yet, if the legislature was mistaken, those whose duty it is to construe the law, must not yield to that mistake; we say, that when the legislature manifests this clear understanding of its own intention, which intention consists with its words, courts are bound by it. Of the meaning of the term robbery, as used in the statute, we think no doubt can be entertained. It must be understood in the sense in which it is recognised and defined at common law.

The question, whether this act extends further than to American citizens, or to persons on board American vessels, or to offences committed against citizens of the United States, is not without its difficulties. The constitution having conferred on congress the power of defining and punishing piracy, there can be no doubt of the right of the legislature to enact laws punishing pirates, although they may be foreigners, and may have committed no par-
*631] ticular offence against the United States. The only *question is, has the legislature enacted such a law? Do the words of the act authorize the courts of the Union to inflict its penalties on persons who are not citizens of the United States, nor sailing under their flag, nor offending particularly against them? The words of the section are in terms of unlimited extent. The words "any person or persons," are broad enough to comprehend every human being. But general words must not only be limited to cases within the jurisdiction of the state, but also to those objects to which the legislature intended to apply them. Did the legislature intend to apply these words to the subjects of a foreign power, who in a foreign ship may commit murder or robbery on the high seas?

The title of an act cannot control its words, but may furnish some aid in showing what was in the mind of the legislature. The title of this act is, "an act for the punishment of certain crimes against the United States." It would seem, that offences against the United States, not offences against the human race, were the crimes which the legislature intended by this law to punish. The act proceeds upon this idea, and uses general terms in this limited sense. In describing those who may commit misprision of treason or felony, the words used are "any person or persons;" yet these words are necessarily confined to any person or persons owing permanent or temporary allegiance to the United States. The 8th section also commences with the
*632] words "any person or persons." But these words must be *limited in some degree, and the intent of the legislature will determine the extent of this limitation. For this intent, we must examine the law. The succeeding member of the sentence commences with the words, "if any captain or mariner of any ship or other vessel, shall piratically run away with such ship or vessel, or any goods or merchandise, to the value of fifty dollars, or yield up such ship or vessel voluntarily to any pirate." The words "any captain or mariner of any ship or other vessel," com-

prehend all captains and mariners, as entirely as the words "any person or persons," comprehend the whole human race. Yet it would be difficult to believe, that the leglislature intended to punish the captain or mariner of a foreign ship, who should run away with such ship, and dispose of her in a foreign port, or who should steal any goods from such ship to the value of fifty dollars, or who should deliver her up to a pirate, when he might have defended her, or even according to previous arrangement. The third member of the sentence also begins with the general words "any seaman." But it cannot be supposed, that the legislature intended to punish a seaman, on board a ship sailing under a foreign flag, under the jurisdiction of a foreign government, who should lay violent hands upon his commander, or make a revolt in the ship. These are offences against the nation under whose flag the vessel sails, and within whose particular jurisdiction all on board the vessel are. Every nation provides for such offences the punishment its own policy may dictate; and no general words of a statute ought to *be construed to embrace them, when committed by foreigners against a foreign government. [*633

That the general words of the two latter members of this sentence are to be restricted to offences committed on board the vessels of the United States, furnishes strong reason for believing that the legislature intended to impose the same restriction on the general words used in the first member of that sentence. This construction derives aid from the 10th section of the act. That section declares, that "any person" who shall "knowingly and wittingly aid and assist, procure, command, counsel or advise, any person or persons, to do or commit any murder or robbery, &c.," shall be an accessory before the fact, and on conviction, shall suffer death. It will scarcely be denied, that the words "any person," when applied to aiding or advising a fact, are as extensive as the same words when applied to the commission of that fact. Can it be believed, that the legislature intended to punish with death, the subject of a foreign prince, who, within the dominions of that prince, should advise a person, about to sail in the ship of his sovereign, to commit murder or robbery? If the advice is not a crime, within the law, neither is the fact advised, a crime within the law.

The opinion formed by the court on this subject might be still further illustrated by animadversions on other sections of the act. But it would be tedious, and is thought unnecessary. The court is of opinion, that the crime of robbery, committed by a person on the high seas, on board of *any ship or vessel, belonging exclusively to subjects of a foreign state, on [*634 persons within a vessel belonging exclusively to subjects of a foreign state, is not a piracy within the true intent and meaning of the act for the punishment of certain crimes against the United States. This opinion will probably decide the case to which it is intended to apply.

Those questions which respect the rights of a part of a foreign empire, which asserts, and is contending for its independence, and the conduct which must be observed by the courts of the Union towards the subjects of such section of an empire who may be brought before the tribunals of this country, are equally delicate and difficult. As it is understood, that the construction which has been given to the act of congress, will render a particular answer to them unnecessary, the court will only observe, that such questions are generally rather political than legal in their character. They

belong more properly to those who can declare what the law shall be; who can place the nation in such a position with respect to foreign powers as to their own judgment shall appear wise; to whom are intrusted all its foreign relations; than to that tribunal whose power as well as duty is confined to the application of the rule which the legislature may prescribe for it. In such contests, a nation may engage itself with the one party or the other; may observe absolute neutrality; may recognise the new state absolutely; or may make a limited recognition of it. The proceeding in courts must depend so entirely on the course of the government, *that it is difficult to give a precise answer to questions which do not refer to a particular nation. It may be said, generally, that if the goverment remains neutral, and recognises the existence of a civil war, its courts cannot consider as criminal, those acts of hostility which war authorizes, and which the new government may direct against its enemy. To decide otherwise, would be to determine that the war prosecuted by one of the parties was unlawful, and would be to arrange the nation to which the court belongs against that party. This would transcend the limits prescribed to the judicial department.

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It follows, as a consequence, from this view of the subject, that persons or vessels employed in the service of a self-declared government, thus acknowlegded to be maintaining its separate existence by war, must be permitted to prove the fact of their being actually employed in such service, by the same testimony which would be sufficient to prove that such vessel or person was employed in the service of an acknowledged state.

The seal of such unacknowledged government cannot be permitted to prove itself; but it may be proved by such testimony as the nature of the case admits; and the fact that such vessel or person is so employed, may be proved, without proving the seal.

JOHNSON, Justice.—The first of these questions arises on the construction of the first division of the 8th section of the act for the punishment of certain crimes. *That act comprises two classes of casee, the second of which may again be subdivided into two divisions. In the second class of cases, each crime is specifically described, in the ordinary mode of defining crimes, and so far the constitutional power of defining and punishing piracies and felonies on the high seas, is strictly complied with. But with regard to the first class of cases, the legislature refers for a definition to other sources—to information not to be found in that section itself. The words are these: "if any person shall commit, upon the high seas, &c., murder or robbery, or any other offence, which, if committed in the body of a county, would, by the laws of the United States, be punishable with death, &c., such person shall, upon conviction thereof, suffer death." Thus referring to the common-law definition of murder and robbery alone, or to the common-law definition of murder and robbery, with the superadded statutory requisite of being made punishable with death, if committed on land, in order to define the offence which, under that section, is made capitally punishable.

*636]

The crime of robbery is the offence charged in this indictment, and the question is, whether it must not be shown, that it must have been made punishable with death, if committed on land, in order to subject the offender

to that punishment, if committed on the high seas. And singular as it may appear, it really is the fact in this case, that these mens' lives may depend upon a comma, more or less, or upon the question whether a relative, which may take in three antecedents just as well as one, shall be confined to one *alone. Upon such a question, I here solemnly declare, that I never will consent to take the life of any man, in obedience to any court; [*637 and if ever forced to choose between obeying this court, on such a point, or resigning my commission, I would not hesitate adopting the latter alternative.

But to my mind it is obvious, that both the intent of the legislature and the construction of the words, are in favor of the prisoners. This, however, is more than I need contend for, since a doubt relative to that construction or intent ought to be as effectual in their favor, as the most thorough conviction. When the intent of the legislature is looked into, it is as obvious as the light, and requires as little reasoning to prove its existence, that the object proposed was, with regard to crimes which may be commited, either on the sea or land, to produce an uniformity in the punishment, so that were death was inflicted in the one case, it should be inflicted in another. And congress certainly legislated under the idea, that the punishment of death had been previously enacted for the crime of robbery on land, as it had, in fact, been for murder, and some other crimes. And in my opinion, this intent ought to govern the grammatical construction, and make the relative to refer to all three of the antecedents, murder, robbery and other crimes, instead of being confined to the last alone. That it may be so applied, consistently with grammatical correctness, no one can deny; and if so, *in favorem vitæ*, we are, in my opinion, legally bound to give it that construction. Again, there is no reason to think, that the word *other* is altogether a supernumerary *member of the sentence. To give the construction contended for in behalf of the United States, that word [*638 must be rendered useless and inoperative: the sentence has the same meaning, with or without it. But if we retain it, and substitute its definition, or examine its effect upon the meaning of the terms associated with it, we then have the following results: *other* is commonly defined to mean *not the same* or (what is certainly synonymous) not before mentioned. With this expression, the sentence would read thus: "murder, or robbery, or any offence, not before mentioned," for which the punishment of death is by law inflicted. And as the use of the comma is exceedingly arbitrary and indefinite, by expunging all the commas from the sentence, the meaning becomes still more obvious. Or, if instead of substituting the words "not before mentioned," we introduce the single term *unenumerated*, in the sense of which the term *other* is unquestionably used by the legislature, the conclusion becomes irresistible in favor of the prisoners. There is another view of this subject that leads to the same conclusion: by supplying an obvious elision, the same meaning is given to this section. The word *other* is responded to by *than*, and the repetition of the excluded words is understood. Thus, is the case before us, by supplying the elision, we "make murder, robbery, or any crime other than murder or robbery," made punishable, &c., the signification of which words, had they been used, would have left no doubt.

There are several inconsistencies growing out of a construction unfavora-

ble to the prisoners, which *merit the most serious consideration. The first is, the most sanguinary character that it gives to this law in its operation; for it is literally true, that under it, a whole ship's crew may be consigned to the gallows, for robbing a vessel of a single chicken, even although a robbery committed on land, for thousands, may not have been made punishable, beyond whipping or confinement. If natural reason is not to be consulted on this point, at least, the mild and benignant spirit of the laws of the United States merit attention. With regard to the mail, this inconsistency actually may occur, under existing laws, should the mail ever again be carried by water, as it has been formerly. This cannot be consistent with the intention of the legislature.

But it is contended, if congress had not intended to make murder and robbery punishable with death, independently of the circumstance of those offences being so made punishable, when committed on land, they would have omitted those specified crimes altogether from this section, and have enacted, generally, that all crimes made punishable with death, on land, should be punished with death, if committed on the seas, without enumerating murder and robbery. This is fair reasoning; and in any case but one of life and death, it might have some weight. But in no case, very great weight; because, in that respect, a legislature is subject to no laws in the selection of the course to be pursued. In this case, the obvious fact is, that they commenced enumerating, and fearing some omission of crimes then supposed subject by law to death, these *general descriptive words
*640] are resorted to. But every other crime that this division of the section comprises, was punishable with death, both those which precede robbery in the enumeration, and those which come after. Robbery, except in case of the mail, stands alone; and, no doubt, was introduced, under the idea, that that also had the same punishment attached to it. If it had not, in fact, then it was not the case on which the legislature intended to act, and according to my views of the grammatical or philological construction of the sentence, it is one on which they have not acted. This construction derives considerable force also, from the consideration that this act is framed on the model of the British statute, which avowedly had this uniformity for its object.

The second question proposed in this case is one on which I presume, there can be no doubt. For the definition of robbery under this act, we must look for the definition of the term in the common law, or we will find it nowhere; and according to my construction, superadd to that definition, the circumstance of its being made punishable with death, under the laws of the United States, if committed on land, and you have described the offence made punishable under this section.

There are eleven questions certified from the circuit court of Massachusetts; but of those eleven, these two only appear to me to arise out of the case. The transcript contains nothing but the indictment and impannelling of the jury. No motion; no evidence; no demurrer *ore tenus*, or case stated, appears upon the transcript, on which the remaining questions could
*641] *arise. On the indictment, the first two questions might well have been raised by the court themselves, as of counsel for the prisoners; but so far as appears to this court, all the other questions might as well have been raised in any other case. I here enter my protest against having these

general questions adjourned to this court. We are constituted to decide causes, and not to discuss themes, or digest systems. It is true, the words of the act, respecting division of opinion in the circuit court, are general; but independently of the consideration, that it was not to be expected that the court could be divided, unless upon questions arising out of some cause depending, the words in the first proviso, "that the cause may be proceeded in," plainly show that the questions contemplated in the act are questions arising in a cause depending; and if so, it ought to be shown that they do arise in the cause, and are not merely hypothetical. In the case of *Martin* v. *Hunter*, 7 Cranch 603, 1 Wheat. 304, this court expressly acted upon this principle, when it went into a consideration of the question, whether any estate existed in the plaintiff in error, before it would consider the question on the construction of the treaty, as applicable to that estate.

If, however, it becomes necessary to consider the other questions in this case, I will lay down a few general principles, which, I believe, will answer all:

1. Congress can inflict punishment on offences committed on board the vessels of the United States, or by citizens of the United States, anywhere; but congress cannot make that piracy, which is not piracy by *the law of nations, in order to give jurisdiction to its own courts over such offences. [*642

2. When open war exists between a nation and its subjects, the subjects of the revolted country are no more liable to be punished as pirates, than the subjects who adhere to their allegiance; and whatever immunity the law of nations gives to the ship, it extends to all who serve on board of her, excepting only the responsibility of individuals to the laws of their respective countries.

3. The proof of a commission is not necessary to exempt an individual serving on board a ship, engaged in the war, because any ship of a belligerent may capture an enemy; and whether acting under a commission or not, is an immaterial question as to third persons: he must answer that to his own government. It is only necessary to prove two facts: 1st. The existence of open war. 2d. That the vessel is really documented, owned and commanded as a belligerent vessel, and not affectedly so, for piratical purposes.

4. For proof of property and documents, it is not to be expected, that any better evidence can be produced than the seal of the revolted country, with such reasonable evidence as the case may admit of, to prove it to be known as such; and a seal once proved, or admitted to a court, ought afterwards to be acknowledged by the court, officially, at least, as against the party who has once acknowledged it.

CERTIFICATE.—This cause came on to be heard, on the transcript of the record of the circuit court of the United States for the district of Massachusetts, *and on the questions on which the judges of that court were divided; and was argued by counsel on the part of the United States. On consideration whereof, this court is of opinion, that a robbery committed on the high seas, although such robbery, if committed on land, would not, by the laws of the United States, be punishable with death, is piracy under the eighth section of the act entitled, "an act for the punish- [*643

ment of certain crimes against the United States;" and that the circuit courts of the United States have jurisdiction thereof. And that the crime of robbery, as mentioned in the said act of congress, is the crime of robbery as recognised and defined at common law.

This court is further of opinion, that the crime of robbery, committed by a person on the high seas, on board of any ship or vessel belonging exclusively to subjects of a foreign state, on persons within a vessel belonging also exclusively to subjects of a foreign state, is not piracy within the true intent and meaning of the act, entitled, "an act for the punishment of certain crimes against the United States," and is not punishable in the courts of the United States.

This court is further of opinion, that when a civil war rages in a foreign nation, one part of which separates itself from the old established government, and erects itself into a distinct government, the courts of the Union must view such newly-constituted government as it is viewed by the legislative and executive departments of the government of the United States. If the government of the Union remains neutral, but recognises the existence of a civil war, the courts *of the Union cannot consider as criminal, *644] those acts of hostility, which war authorizes, and which the new government may direct against its enemy. In general, the same testimony which would be sufficient to prove that a vessel or a person is in the service of an acknowledged state, must be admitted to prove that a vessel or person is in the service of such newly erected government. Its seal cannot be allowed to prove itself, but may be proved by such testimony as the nature of the case admits. And the fact that a vessel or person is in the service of such government may be established otherwise, should it be impracticable to prove the seal.

All which is ordered to be certified to the circuit court of the United States for the district of Massachusetts.

APPENDIX.

NOTE I.

Documents on the Subject of Blockades.

Extract of a Letter from Mr. King, minister plenipotentiary of the United States, at London, to Mr. Pickering, secretary of state, dated London, July 15th, 1799.

"SEVEN or eight of our vessels, laden with valuable cargoes, have been lately captured, and are still detained for adjudication; these vessels were met in their voyages to and from the Dutch ports declared to be blockaded. Several notes have passed between Lord Grenville and me upon this subject, with the view, on my part, of establishing a more limited and reasonable interpretation of the law of blockade than is attempted to be enforced by the English government. Nearly one hundred Danish, Russian and other neutral ships have, within a few months, been in like manner intercepted, going to and returning from the United Provinces. Many of them, as well as some of ours, arrived in the Texel, in the course of the last winter, the severity of which obliged the English fleet to return to their ports, leaving a few frigates only to make short cruises off the Texel, as the season would allow.

"My object has been to prove, that in this situation of the investing fleet, there can be no effective blockade, which, in my opinion, cannot be said to exist, without a competent force stationed, and present, at or near the entrance of the blockaded port."

*4] ***Extract of a Letter from Mr. King to Lord Grenville, dated Downing street, London, May 23d, 1799.**

"IT seems scarcely necessary to observe, that the presence of a competent force is essential to constitute a blockade; and although it is usual for the belligerent to give notice to neutral nations, when he institutes a blockade, it is not customary to give any notice of its discontinuance; and that, consequently, the presence of the blockading force is the natural criterion by which the neutral is enabled to ascertain the existence of the blockade; in like manner as the actual investment of a besieged place is the only evidence by which we decide, whether the siege is continued or raised. A siege may be commenced, raised, recommenced and raised again, but its existence at any precise time, must always depend upon the fact of the presence of an investing army. This interpretation of the law of blockade is of peculiar importance to nations situated at a great distance from each other, and between whom a considerable length of time is necessary to send and receive information."

Extract of a Letter from Mr. Marshall, secretary of state, to Mr. King, dated September 20th, 1800.

"2d. THE right to confiscate vessels bound to a blockaded port has been unreasonably extended to cases not coming within the rule, as heretofore adopted. On principle, it might well be questioned, whether this rule can be applied to a place not com-

pletely invested by land as well as by sea. If we examine the reasoning on which is founded the right to intercept and confiscate supplies designed for a blockaded town, it will be difficult to resist the conviction, that its extention to towns invested by sea only is an unjustifiable encroachment on the rights of neutrals. But it is not of this departure from principle, a departure which has received some sanction from practice, that we mean to complain. It is, that *ports, not effectually blockaded by a force, capable of completely investing them, have yet been declared in a state of [*5 blockade, and vessels attempting to enter therein have been seized, and on that account confiscated. This is a vexation proceeding directly from the government, and which may be carried, if not resisted, to a very injurious extent. Our merchants have greatly complained of it, with respect to Cadiz and the ports of Holland.

"If the effectiveness of the blockade be dispensed with, then every port of all the belligerent powers may, at all times, be declared in that state, and the commerce of neutrals be thereby subjected to universal capture. But if this principle be strictly adhered to, the capacity to blockade will be limited by the naval force of the belligerent, and of consequence, the mischief to neutral commerce cannot be very extensive. It is, therefore, of the last importance to neutrals, that this principle be maintained unimpaired.

"I observe, that you have pressed this reasoning on the British minister, who replies, that an occasional absence of a fleet from a blockaded port ought not to change the state of the place. Whatever force this observation may be entitled to, where that occasional absence has been produced by accident, as a storm, which for a moment blows off the fleet, and forces it from its station, which station it immediately resumes, I am persuaded, that where a part of the fleet is applied, though only for a time, to other objects, or comes into port, the very principle, requiring an effective blockade, which is, that the mischief can then only be co-extensive with the naval force of the belligerent, requires, that during such temporary absence, the commerce of neutrals to the place should be free."

*Extract of a Letter from Mr. Madison to Mr. Charles Pinkney, minister plenipotentiary of the United States, at Madrid, dated, Department of State, Washington, October 25th, 1801. [*6

"The pretext for the seizure of our vessels seems at present to be, that Gibraltar has been proclaimed in a state of blockade, and that the vessels are bound to that port. Should the proceeding be avowed by the Spanish government, and defended on that ground, you will be able to reply:

"1st. That the proclamation was made as far back as the 15th of February 1800, and has not since been renewed; that it was immediately protested against by the American and other neutral ministers at Madrid, as not warranted by the real state of Gibraltar, and that no violations of neutral commerce having followed the proclamation, it was reasonably concluded to have been rather a menace against the enemies of Spain, than a measure to be carried into execution against her friends.

2d. That the state of Gibraltar is not, and never can be, admitted by the United States to be that of a real blockade. In this doctrine, they are supported by the law of nations, as laid down in the most approved commentators, by every treaty which has undertaken to define a blockade, particularly,(*a*) those of latest date among the maritime nations of Europe, and by the sanction of Spain herself, as a party to the armed neutrality in the year 1781. The spirit of articles 15 and 16 of the treaty between the United States and Spain may also be appealed to, as favoring a liberal construction of the rights of the parties in such cases. In fact, this idea of an investment, a siege or a blockade, as collected from the authorities referred to, neccessarily results from the force of those terms; and though it has been sometimes grossly

(*a*) See late treaties between Russia and Sweden, and between Russia and Great Britain.

violate or evaded by powerful nations, in pursuit of favorite objects, it has invariably kept its place in the code of public law, and cannot be shown to have been expressly renounced, in a single stipulation between particular nations.

*3d. That the situation of the naval force at Algesiras, in relation to Gibraltar, has not the shadow of likeness to a blockade, as truly and legally defined. [*7
This force can neither be said to invest, besiege or blockade the garrison, nor to guard the entrance into the port. On the contrary, the gun-boats infesting our commerce have their stations in another harbor, separated from that of Gibraltar by a considerable bay; and are so far from beleaguering their enemy at that place, and rendering the entrance into it dangerous to others, that they are, and ever since the proclamation of the blockade, have been, for the most part, kept at a distance by a superior naval force, which makes it dangerous to themselves to approach the spot.

4th. That the principle on which the blockade of Gibraltar is asserted, is the more inadmissible, as it may be extended to every other place, in passing to which vessels must sail within the view and reach of the armed boats belonging to Algesiras. If, because a neutral vessel bound to Gibraltar can be annoyed and put in danger by waylaying cruisers, which neither occupy the entrance into the harbor, nor dare approach it, and by reason of that danger is liable to capture, every part of the Mediterranean coasts and islands, to which neutral vessels must pass through the same danger, may, with equal reason, be proclaimed in a state of blockade, and the neutral vessels bound thereto made equally liable to capture: Or, if the armed vessels from Algesiras alone should be insufficient to create this danger in passing into the Mediterranean, other Spanish vessels, co-operating from other stations, might produce the effect, and the ports thereby not only blockade any particular port of any particular nation, but blockade at once a whole sea surrounded by many nations. Like blockades might be proclaimed by any particular nation, enabled by its naval superiority to distribute its ships at the mouth of the same, or any similar sea, or across channels or arms of the sea, so as to make it dangerous for the commerce of other nations to pass to its destination. These monstrous consequences condemn the principle from which they flow, and ought to unite against it every nation, Spain among the rest, which has an interest in the rights of the sea. Of this Spain herself appears to have been sensible, in the year 1780, when she yielded to Russia ample satisfaction *for seizures of her vessels, made under the pretext of a general blockade of the Mediterranean, and [*8
followed it with her accession to the definition of a blockade contained in the armed neutrality.

5th. That the United States have the stronger ground for remonstrating against the annoyance of their vessels, on their way to Gibraltar, inasmuch as, with very few exceptions, their object is not to trade there, for the accommodation of the garrison, but merely to seek advice or convoy, for their own accommodation, in the ulterior objects of their voyage. In disturbing their course to Gibraltar, therefore, no real detriment results to the enemy of Spain, whilst a heavy one is committed on her friends. To this consideration, it may be added, that the real object of the blockade is, to subject the enemy to privations, which may co-operate with external force, in compelling them to surrender; an object which cannot be alleged in a case, where it is well known, that Great Britain can, and does, at all times, by her command of the sea, secure to the garrison of Gibraltar every supply which it wants.

6th. It is observable, that the blockade of Gibraltar is rested, by the proclamation, on two considerations: one, that it is necessary to prevent illicit traffic, by means of neutral vessels, between Spanish subjects and the garrison there; the other, that it is a just reprisal on Great Britain, for the proceedings of her naval armaments against Cadiz and St. Lucar. The first can surely have no weight with neutrals, but on a supposition, never to be allowed, that the resort to Gibraltar, under actual circumstances, is an indulgence from Spain, not a right of their own; the other consideration, without examining the analogy between the cases referred to, and that of Gibraltar, is equally without weight with the United States, against whom no right can accrue to Spain from its complaints against Great Britain; unless it could be shown that the

United States were in an unlawful collusion with the latter; a charge which they well know that Spain is too just and too candid to insinuate. It cannot even be said, that the United States have acquiesced in the depredations committed by Great Britain, under
*9] whatever pretexts, on their lawful commerce. Had this, indeed, been the *case, the acquiescence ought to be regarded as a sacrifice made by prudence to a love of peace, of which all nations furnish occasional examples, and as involving a question between the United States and Great Britain, of which no other nation could take advantage against the former. But it may be truly affirmed, that no such acquiescence has taken place. The United States have sought redress for injuries from Great Britain, as well as from other nations. They have sought it by the means which appeared to themselves, the only rightful judges, to be the best suited to their object; and it is equally certain, that redress has, in some measure, been obtained, and that the pursit of complete redress is by no means abandoned.

7th. Were it admitted, that the circumstances of Gibraltar, in February 1800, the date of the Spanish proclamation, amounted to a real blockade, and that the proclamation was, therefore, obligatory on neutrals; and were it also admitted, that the present circumstances of that place amount to a real blockade (neither of which can be admitted), still, the conduct of the Algesiras cruizers is altogether illegal and unwarrantable. It is illegal and unwarrantable, because the force of the proclamation must have expired, whenever the blockade was actually raised, as must have been unquestionably the case, since the date of the proclamation, particularly and notoriously, when the port of Algesiras itself was lately entered and attacked by a British fleet, and because on a renewal of the blockade, either a new proclamation ought to have issued, or the vessels making for Gibraltar ought to have been premonished of their danger, and permitted to change their course as they might think proper. Among the abuses committed under the pretext of war, none seem to have been carried to a greater extravagance, or to threaten greater mischief to neutral commerce, than the attempt to substitute fictitious blockades, by proclamation, for real blockades, formed according to the law of nations; and consequently, none against which it is more necessary for neutral nations to remonstrate effectually, before the innovations acquire maturity and authority, from repetitions on one side, and silent acquiescence on the other.

*10] *Mr. Smith, secretary of the navy, to Commodore Preble.

Navy Department, Feb. 4, 1804.

Sir: Your letter of the 12th of November, inclosing your circular notification of the blockade of the port of Tripoli, I have received. Sensible, as you must be, that it is the interest, as well as the disposition of the United States, to maintain the rights of neutral nations, you will, I trust, cautiously avoid whatever may appear to you to be incomplatible with those rights. It is, however, deemed necessary, and I am charged by the President to state to you, what, in his opinion, characterizes a blockade. I have, therefore, to inform you, that the trade of a neutral in articles not contraband, cannot be rightfully obstructed to any port, not actually blockaded by a force so disposed before it, as to create an evident danger of entering it. Whenever, therefore, you shall have thus formed a blockade of the port of Tripoli, you will have a right to prevent any vessel from entering it, and to capture, for adjudication, any vessel that shall attempt to enter the same, with a knowledge of the existence of the blockade. You will, however, not take as prize, any vessel attempting to enter the port of Tripoli, without such knowledge; but, in every case of an attempt to enter, without a previous knowledge of the existence of the blockade, you will give the commanding officer of such vessel notice of such blockade, and forewarn him from entering. And if, after such a notification, such vessel shall again attempt to enter the same port, you will be justifiable in sending her into port for adjudication. You will, sir, hence perceive, that you are to consider your circular communication to the neutral powers, not as an evidence that every person attempting to enter has previous knowledge of the blockade, but merely as a friendly notification to them of the blockade, in order that they

might make the necessary arrangements for the discontinuance of all commerce with such blockaded port. I am, &c. (Signed) R. SMITH.

Commodore Preble.

*(Copy.) [*11

Mr. Merry to Mr. Madison.

Washington, April 12, 1804.

Sir: Mr. Thornton not having failed to transmit to his majesty's government an account of the representation which you were pleased to address to him, under date of the 27th of October, last year, respecting the blockade of the islands of Martinique and Guadaloupe, it is with great satisfaction, Sir, that I have just received his majesty's commands, signified to me by his principal secretary of state for foreign affairs, under date of the 6th of January last, to communicate to you the instructions which have, in consequence of your representation, been sent to Commodore Hood, and to the judges of the vice-admiralty courts in the West Indies. I have, accordingly, the honor to transmit to you, Sir, inclosed, the copy of a letter from Sir Evean Napean, secretary to the board of admiralty, to Mr. Hammond, his majesty's under-secretary of state for foreign affairs, specifying the nature of the instructions which have been given.

His majesty's government doubt not that the promptitude which has been manifested in redressing the grievance complained of by the government of the United States, will be considered by the latter as an additional evidence of his majesty's constant and sincere desire to remove any ground of misunderstanding, that could have a tendency to interrupt the harmony which so happily subsists between his government and that of the United States. I have the honor to be, with high respect and consideration, your most obedient humble servant,

(Signed) ANTH. MERRY.

*(Copy.) [*12

Admiralty Office, 5th January 1804.

Sir: Having communicated to the lords of the admiralty, Lord Hawkesbury's letter of the 28d ultimo, inclosing the copy of a dispatch which his lordship had received from Mr. Thornton, his majesty's *chargè d'affaires* in America, on the subject of the blockade of the islands of Martinique and Guadaloupe, together with the report of the advocate-general. Thereupon, I have their lordship's commands to acquaint you, for his lordship's information, that they have sent orders to Commodore Hood, not to consider any blockade of those islands as existing, unless in respect of particular ports which may be actually invested, and then not to capture vessels bound to such ports, unless they shall previously have been warned not to enter them, and that they have also sent the necessary directions on the subject to the judges of the vice-admiralty courts in the West Indies and America. I am, &c.

(Signed) EVEAN NEPEAN.

George Hammond, Esq.

Mr. Merry to Mr. Madison.

Washington, April 12, 1804.

Sir: I have the honor to acquaint you, that I have just received a letter from rear-admiral Sir John Duckworth, commander-in-chief of his majesty's squadron at Jamaica, dated the second of last month, in which he desires me to communicate to the government of the United States, that he has found it expedient for his majesty's service, to convert the siege, which he lately attempted, of Curaçoa, into a blockade of that island. I cannot doubt, sir, that this blockade will be conducted conformably to the instructions which, as I have had the honor to *acquaint you in another letter of this date, have been recently sent on this subject to the commander in [*13 chief of his majesty's forces, and to the judges of the vice-admiralty courts in the

West Indies, should the smallness of the island of Curagoa still render necessary any distinction of the investment being confined to particular ports. I have the honor to be, &c.

(Signed) ANT. MERRY.

NOTE II.

On the Patent Laws.[1]

THE patent acts of the United States are, in a great degree, founded on the principles and usages which have grown out of the English statute on the same subject. It may be useful, therefore, to collect together the cases which have been adjudged in in England, with a view to illustrate the corresponding provisions of our own laws; and then bring in review the adjudications in the courts of the United States.

By the statute of 21 Jac. I., ch. 3, commonly called the statute of monopolies, it is enacted (§ 1), "that all monopolies, and all commissions, grants, licenses, charters and letters-patent, heretofore made or granted, or hereafter to be made or granted, to any person or persons, bodies politic or corporate whatsoever, of or for the sole buying, selling, making, working or using of anything within this realm, or the dominion of Wales, or of any other monopolies, or of power, liberty or faculty to dispense with any others, or to give license or toleration to do, use or exercise anything against the tenor or purport of any law or statute, or to give or make any warrant for any such dispensation, license or toleration, to be had or made, or to agree or compound with any others for any penalty or forfeiture, limited by any statute, or of any grant or promise of the benefit, profit *or commodity of any forfeiture, penalty or sum of money that is or shall be due by any statute, before judgment thereupon had; and all proclamations, inhibitions, restraints, warrants of assistance and all other matters and things whatsoever, any way tending to the instituting, erecting, strengthening, furthering or countenancing the same, or any of them, are altogether contrary to the laws of the realm, and so are and shall be utterly void and of none effect, and in no wise to be put in use or execution." The 6th section, however, provides, "that any declaration before mentioned, shall not extend to any letters-patent, and grants of privilege, for the term of fourteen years, or under, hereafter to be made, of the sole working or making of any manner of new manufactures, within this realm, to the true and first inventor and inventors of such manufactures, which others, at the time of making such letters-patent and grants, shall not use, so as also they be not contrary to the law, nor mischievous to the state, by raising prices of commodities at home, or hurt of trade, or generally inconvenient; the said fourteen years to be accounted from the date of the first letters-patent, or grant of such privilege hereafter to be made, but that the same shall be of such force as they should be, if this act had never been made, and none other."

*14]

It is under this last section, that patents for new and useful inventions are now granted in England; and by a proviso or condition, always inserted in every patent, the patentee is bound particularly to describe and ascertain the nature of his invention, and in what manner the same is to be constructed or made, by an instrument in writing, under his hand and seal, and to cause the same to be enrolled in the court of chancery, within a specified time. Harmar *v.* Payne, 11 East 101; Boulton *v.* Bull, 2 H. Bl. 463; Hornblower *v.* Boulton, 8 T. R. 95; 2 Bl. Com. 407, note by Christian, 7. This instrument is usually termed the specification of the invention; and all such instruments are preserved in an office for public inspection.

[1] This note was written by Mr. Justice STORY. See Curtis on Patents, § 271, n

Upon the construction of the British patent act, taken in connection with the conditions inserted in the letters-patent, a great variety of decisions have been made.

1. As the statute contains no restriction confining the grants to British subjects, *it is every day's practice, to grant patents to foreigners, and no such patent has ever been brought into judicial doubt. [*15

2. A patent can be granted only for a thing new; but it may be granted to the first inventor, if the invention be new, in England, though the thing was practised beyond sea before; for the statute speaks of new manufactures, within this realm; so that if it be new here, it is within the statute, and whether learned by travel or study, is the same thing. Edgeberry *v.* Stevens, 2 Salk. 447; Hawk. P. C. b. 1, ch. 79. And see Noy 182, 188.

3. The language of the statute is new manufacture; but the terms are used in an enlarged sense, as equivalent to new device or contrivance, and apply not only to things made, but to the practice of making. Under *things made*, we may class, in the first place, new compositions of things, such as manufactures in the ordinary sense of the word; secondly, all mechanical inventions, whether made to produce old or new effects; for a new piece of mechanism is certainly a thing made. Under the practice of making, we may class all new artificial manners of operating with the hand, or with instruments in common use, new processes in any art, producing effects useful to the public. When the effect produced is some new substance, or composition, it would seem, that the privilege of the sole working, or making, ought to be for such new substance or composition, without regard to the mechanism or process, by which it has been produced, which, though perhaps also new, will be only useful as producing the new substance. When the effect produced is no new substance, or composition of things, the patent can only be for the mechanism, if new mechanism is used; or for the process, if it be a new method of operating, with or without old mechanism, by which the effect is produced. *Per* Eyre, Ch. J., in Boulton *v.* Bull, 2 H. Bl. 463, 492, and Lawrence, J., in Hornblower *v.* Boulton, 8 T. R. 95, 106. A patent, therefore, under certain circumstances, may be good for a method, as well as for an engine or machine. Ibid.; and 8 T. R. 95, 106; Rex *v.* Cutler, 1 Starkie 354.

4. A patent cannot be for a mere principle, properly so called; that is, for an elementary truth. But the word principle is often used in a more lax sense, to signify constituent parts, peculiar structure, or process; and in specifications, it is generally used in this latter sense; and *in this view, it may well be the subject of a patent. Ibid. [*16

5. It was formerly considered, that a patent could not be for an improvement (3 Inst. 184); but that opinion has been long since exploded; and it is now held, that a patent may well be for a new improvement. Harmar *v.* Playne, 14 Ves. 130; Ex parte Fox, 1 Ves. & Beame 67; Boulton *v.* Bull, 2 H. Bl. 463, 488; 8 T. R. 95; Bull. N. P. 77.

6. A patent must be of such manufacture or process, as no other did, at the time of making the letters-patent, use; for though it were newly-invented, yet, if any other did use it, at the time of making the letters-patent, or grant of the privilege, it is declared void by the act. 3 Inst. 184. And in a very recent case of a patent for a new mode of making verdigris, one of the objections was, that the invention was in public sale by the patentee, before the grant of the patent; and Gibbs, Ch. J., on that occasion, said, "with respect to this objection, the question is somewhat new. Some things are obvious, as soon as they are made public; of others, the scientific world may possess itself by analysis; some inventions almost baffle discovery. But to entitle a man to a patent, the invention must be new to the world. The public sale of that, which is afterwards made the subject of a patent, though sold by the inventor only, makes the patent void. It is in evidence, that a great quantity was sold in the course of four months, before the patent was obtained." And if the jury were satisfied of that fact, his lordship added, "that he thought the patent void." Wood *v.* Zimmer, 1 Holt 58.

7. The invention must not only be new, but useful; for if it be contrary to law, or

mischievous, or hurtful to trade, or generally inconvenient, it is, by the terms of the statute, void. 3 Inst. 184.

8. A patent can legally be granted only to the first and true inventor; for such are the descriptive terms of the statute. 3 Inst. 184. But if the original inventor has confined the invention to his closet, and the public be not acquainted with it, a second inventor, who makes it public, is entitled to a patent. Boulton *v.* Bull, 2 H. Bl. 463; and Dolland's patent, cited 2 H. Bl. 470, 487.

9. The patent must not be more extensive than the invention; therefore, if the invention consist in an addition or improvement only, and the patent is for the whole machine, or manufacture, it is void. Buller's N. P. 76; Boulton *v.* Bull, *2 H. *17] Bl. 463, and cases there cited; King *v.* Else, 11 East 109, note; Harmar *v.* Playne, Ibid. 101; s. c. 14 Ves. 180. Therefore, where a patent was for the exclusive liberty of making lace, composed of silk and cotton thread mixed, not of any particular mode of making it; and it was proved, that silk and cotton thread were before mixed on the same frame for lace, in some mode or other, though not like the plaintiff's, the patent was held void, as being more extensive than the invention. King *v.* Else, 11 East 109, note. A person may obtain a patent for a machine, consisting of an entirely new combination of parts, although all the parts may have been separately used in former machines; and the patent may correctly set out the whole, as the invention of the patentee. But if a combination of a certain number of those parts have previously existed, up to a certain point, in former machines, the patentee merely adding other combinations, the patent should comprehend such improvements only. Bovill *v.* Moore, 2 Marsh. 211.

10. If a person has invented an improvement upon an existing patented machine, he is entitled to a patent upon his improvement; but he cannot use the original machine, until the patent for it has expired. Ex parte Fox, 1 Ves. & Beame 67.

11. Although the specification is not annexed to a patent in England, and the patent contains a concise description only of the invention, yet, as there is a proviso in the patent, requiring the enrolment of a specification in chancery, within a specified time, and in default, making the patent void, the patent is always construed in connection with the specification, and the latter is deemed a part of the patent, at least, for the purpose of ascertaining the nature and extent of the invention claimed by the patentee. Boulton *v.* Bull, 2 H. Bl. 463; Hornblower *v.* Boulton, 8 T. R. 95.

12. Care should be taken, that the specification comports with the patent; for otherwise, it will not sustain the grant. For, where a patent was obtained for an improved mode of lighting cities, it was held by Le Blanc, J., that it was not supported by a specification, describing an improved lamp. The patent ought to have been for an improved street lamp. Lord Cochrane *v.* Smethurst, 1 Starkie 205. No technical words, however, are necessary to explain the subject *of a patent; but the court will *18] construe the terms of the patent and of the specification, in a liberal manner, and give them such a meaning as best comports with the apparent intention of the patentee. Hornblower *v.* Boulton, 8 T. R. 95; Boulton *v.* Bull, 2 H. Bl. 463. Therefore, where the patent was "for a method of lessening the consumption of steam and fuel in fire-engines," one objection was, that the patent was for a philosophical principle only, neither organized, nor capable of being organized, whereas, it ought to have been for a formed machine; a second objection was, that if it was a patent for a formed machine, it was for the whole machine, when the invention was only an improvement or addition to an existing machine. But the court of king's bench, on examining the specification, were of opinion, that both of the objections were unfounded, although the terms of the specification were so doubtful and obscure, as to have produced a division of opinion in the court of common pleas. Hornblower *v.* Boulton, 8 T. R. 95; Boulton *v.* Bull, 2 H. Bl. 463. Both of these cases were very elaborately discussed, and contain more learning on the subject of patents than can be found in any other adjudications, and are, therefore, deserving of the most accurate attention of every lawyer. In both of them, all the judges agreed, that a mere mistake in terms, or in the correct sense of words, would not vitiate a patent, if the court could give a reason-

able construction to the whole specification. Mr. Justice HEATH said, "when a mode of doing a thing is referred to something permanent, it is properly termed an engine; when to something fugitive, a method." "If method and machinery had been used by the patentee as convertible terms, and the same consequences would result from both, it might be too strong to say, that the inventor should lose the benefit of his patent, by the misapplication of this term." "Method is a principle reduced to practice; it is, in the present instance, the general application of a principle to an old machine." "A patent for an improvement of a machine, and a patent for an improved machine, are, in substance, the same. The same specification would serve for both patents; the new organization of parts is the same in both." Mr. Justice ROOKE said, "a new invented method *conveys to my understanding the idea of a new mode of construction. I think, those words are tantamount to fire-engines of a newly-invented construction; at least, I think they will bear this meaning, if they do not necessarily exclude every other. The specification shows that this was the meaning of the words, as used by the patentee, for he has specified a new and particular mode of constructing fire-engines. It seems, therefore, but reasonable, that if he sets forth his improvement intelligibly, his specification should be supported, though he professes only to set forth the principle." Mr. Justice BULLER said, "the method and mode of doing a thing are the same; and I think it impossible to support a patent for a method only, without having carried it into effect, and produced some new substance." "When the thing is done, or produced, then it becomes the manufacture which is the proper subject of a patent." The remarks of Lord Chief Justice EYRE have been already stated. He, however, considered the patent not to be for a fire-engine, but in effect for a manner of working a fire-engine, so as to lessen the consumption of steam; and he added, "the specification calls a method of lessening the consumption of steam in fire-engines a principle, which it is not; the act (of parliament) calls it an engine, which, perhaps, also, it is not; but both the specification and statute are referrible to the same thing, and when they are taken with their correlative, are perfectly intelligible." "A narrower ground was taken in the argument, which was to expound the word engine, in the body of this act (meaning the special act of parliament for this patent), in opposition to the title of it, to mean a method; and I am ready to say, I would resort to that ground, if necessary, in order to support the patent, *ut res magis valeat quam pereat.*" In the king's bench, Mr. Justice LAWRENCE observed, "engine and method mean the same thing, and may be the subject of a patent. Method, properly speaking, is only placing several things, and performing several operations, in the most convenient order; but it may signify contrivance or device; so may an engine; and therefore, I think it may answer the word method. So, principle may mean an elementary truth; but it may also mean constituent parts." [*19

13. The patent being granted upon *condition that the invention is new (at least, in England) and useful, and also that the patentee shall deliver and enrol in chancery a specification of his invention, it is necessary for the patentee to establish, by proof, when his invention is called in question in a suit, that he has complied with these conditions. If, therefore, the novelty or effect of the invention be disputed, the patentee must show in what his invention consists, and that he produced the effect proposed by the patent, in the manner specified. Slight evidence of this, on his part, is sufficient; and it is then incumbent on the defendant, to falsify the specification. Turner *v.* Winter, 1 T. R. 602. [*20

14. In respect to specifications (objections to which form the most common, and indeed, usually, the most fatal defence to suits for infringements of patents), several rules have been laid down. In the first place, a man, to entitle himself to the benefit of a patent of monopoly, must disclose his secret, and specify his invention, in such a way, that others of the same trade, who are artists, may be taught to do the thing for which the patent is granted, by following the directions of the specification, without any new invention, or addition of their own. Rex *v.* Arkwright, Bull. N. P. 77. In the second place, he must so describe it, that the public may, after the expiration of the term, have the use of the invention in as cheap and beneficial a way as the pat-

entee himself uses it; and therefore, if the specification describe many parts of an instrument or machine, and the patentee uses only a few of them, or does not state how they are to be put together or used, the patent is void. Rex *v.* Arkwright, Bull. N. P. 77; Harmar *v.* Playne, 11 East 101. So, if the patentee could only make the article with two or three of the ingredients specified, and he has inserted others which will not answer the purpose, that will avoid the patent. So, if he makes the article with cheaper materials than those which he has enumerated, although the latter will answer the purpose, the patent is void. Turner *v.* Winter, 1 T. R. 602. In the third place, if the specification be, in any part of it, materially false or defective, or obscure and ambiguous, or give directions which tend to mislead the public, the patent is void. Rex *v.* Arkwright, Bull. N. P. 77; Turner *v.* Winter, 1 T. R. 602. *Therefore, where, in a patent for trusses for ruptures, the patentee omitted what was very material for tempering the steel, which was rubbing it with tallow, Lord MANSFIELD held the patent, for want of it, void. Liardet *v.* Johnson, Bull. N. P. 76. s. c. cited 1 T. R. 602, 608, *per* BULLER, J. So, where a patent was for a new mode of making verdigris, and the specification omitted an ingredient (*aqua fortis*) which, though not necessary to the composition for which the patent was claimed, was a more expeditious and beneficial mode of producing the same effects, and was, as such, used by the patentee, Lord Ch. J. GIBBS held the patent void. Wood *v.* Zimmer, 1 Holt 58. So, if the specification direct an ingredient to be used, which will not answer the purpose, or is never used by the patentee, the patent is void. Turner *v.* Winter, 1 T. R. 602. So, if the patentee says, in his specification, he can produce three things by one process, and he fails in any one, the patent is void. Ibid. 602. So, if the specification direct the same thing to be produced several ways, or by several different ingredients, and any of them fail, the patent is void. Ibid. 602. In the fourth place, if the invention be of an improvement only, it is indispensable, that the patent should not be more broad than the invention, and the specification should be drawn up in terms which do not include anything but the improvement. Boulton *v.* Bull, 2 H. Bl. 463; Bull. N. P. 76; Bovill *v.* Moore, 2 Marsh. 211. And in the specification for such improvement, it is essential to point out precisely what is new and what is old; and it is not sufficient to give a general description of the construction of the instrument, without such distinction, although a plate be annexed, containing detached and separate representations of the parts in which the improvement consists. Therefore, where a patent was "for certain improvements in the making of umbrellas and parasols," and the specification contained a minute description of the construction of them, partly including the usual mode of stitching the silk, and also certain improvements in the insertion of the stretches, &c., and throughout the whole specification no distinction was made between what was new and what was old, Lord ELLENBOROUGH *said, "the patentee ought, in his specification, to inform the person who consults it, what is new and what is old. He should say, my improvement consists in this, describing it by words, if he can, or, if not, by reference to figures. But here, the improvement is neither described in words nor figures, and it would not be in the wit of man, unless he were previously acquainted with the construction of the instrument, to say what was new and what was old. A person ought to be warned by the specification against the use of a particular invention." McFarlane *v.* Price, 1 Starkie 199. And it may be added also, that the public have a right to purchase the improvement by itself, and not to be incumbered with other things, where the improvement is of an old machine. But where the patentee obtained a patent for a new machine, and afterwards, another patent for improvements in the said machine, in which the grant of the former was recited, it was held, that a specification, containing a full description of the whole machine, so improved, but not distinguishing the new improved parts, or referring to the former specification, otherwise than as the second recited the first, was sufficient. Lord ELLENBOROUGH, on that occasion, said, "it may not be necessary, indeed, in stating a specification of a patent for an improvement, to state precisely all the former known parts of the machine, and then to apply to those the improvement; but on many occasions, it may be sufficient to refer generally to them. As, in the instance of a common watch, it may

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be sufficient for the patentee to say, take a common watch, and add or alter such and such parts, describing them." Harmar *v.* Playne, 11 East 101; s. c. 14 Ves. 130. The case also of Bovill *v.* Moore, already cited (2 Marsh. 211), affords very important instruction on this point. In the fifth place, if a patentee in his specification sum up the principle in which his invention consists, if this principle be not new, the patent cannot be supported, although it appear that the application of the principle, as described in the specification, be new; for the patentee, by such summing up, confines himself to the benefit only of the principle so stated. Rex *v.* Cutler, 1 Starkie 354.

15. If a patent is void, the patentee cannot enforce performance of a *covenant for the observance of the exclusive right, entered into by the covenantor, in contemplation of the patent being good. Hayne *v.* Maltby, 3 T. R. 438. [*23

16. The right of a patentee is assignable at law; and upon such an assignment, the assignee has the exclusive right to maintain an action for any infringement of the patent. See Boulton *v.* Bull, 2 H. Bl. 463.

17. Where the patentee has assigned his patent, in an action by the assignee against the patentee, for an infringement of the patent, the latter will not be permitted to aver against his deed, that the invention is not new. Oldham *v.* Langmead, cited 3 T. R. 439.

18. Where the patent is void, from any of the causes before stated, the party sued for an infringement may, under the general issue, avail himself of any such matter in his defence.

19. Or the patent itself may be repealed by a *scire facias* by the king, upon the ground of fraud, or false suggestion. The mode of proceeding on *scire facias* may be seen in 2 Saunders 72, Williams's note, (4) § 4.

These are the principal doctrines established in the English courts upon the subject of patents for new inventions. In respect to the adjudications under the patent laws of the United States, it is matter of regret, that so few of them have been published; but the following are the leading provisions of the act, and the principles which have been recognised as applicable to it. It may be convenient to follow the order of the patent act itself, and to arrange the decisions under the corresponding heads, to which they properly belong.

The first patent act of the United States was passed in the year 1790 (Act of the 10th of April 1790, ch. 34), and was repealed by another act passed in the year 1793 (Act of the 21st of February 1793, ch. 11), and this last act, as amended by the act of 1800 (Act of the 17th of April 1800, ch. 25), constitutes the present general patent law of the United States.

1. By the first section of the act of 1793, any citizen who has invented any new and useful art, machine, manufacture or composition of matter, or any new and useful improvements therein, not known or used before the application, may, on application and petition to the secretary of state, obtain a patent for the exclusive right and liberty of making, constructing, using and *vending to others to be used, the said invention or discovery, upon complying with the regulations of the act; [*24 and the patent is required to recite all the allegations and suggestions of the petition, and give a short description of the invention or discovery. The letters-patent, previous to their being issued, are to be examined by the attorney-general, and are by him to be certified to be conformable to law, and are then to be recorded in the office of the secretary of state. The act of 1800, ch. 25, § 1, 2, extends this provision to aliens who have resided two years in the United States; and also to the legal representatives and devisees of a person entitled to a patent, who dies before it is obtained. The original inventor of a machine, who has reduced his invention first into practice, is entitled to a priority of the patent-right; and a subsequent inventor, although an original inventor, cannot sustain his claim although he has obtained the first patent; for *qui prior est in tempore, potior est in jure.* Woodcock *v.* Parker, 1 Gallis. 438. Odiorne *v.* Winkley, 2 Ibid. 51. And therefore, every subsequent patentee, although an original inventor, may be defeated of his patent-right, upon proof of such prior invention put into actual use (Bedford *v.* Hunt, 1 Mason 302); for then, the invention cannot be

considered as new. If an inventor make a gift of his invention to the public, and suffer it to go into general use, he cannot afterwards resume the invention and claim an exclusive right under a patent. Whittemore *v.* Cutter, 1 Gallis. 478. By useful invention, in the patent act, is meant an invention which may be applied to a beneficial use in society, in contradistinction to an invention injurious to the morals, health or good order of society, or frivolous and insignificant. Bedford *v.* Hunt, 1 Mason 302; Lowell *v.* Lewis, Ibid. 182. It is not necessary to establish, that it is in all cases superior to the modes now in use for the same purpose. Ibid.

2. By the second section, any person who shall have invented an improvement shall not be at liberty to use the original discovery, nor shall the original inventor be at liberty to use the improvement. And the simply changing the form or the proportions of any machine, or composition of matter, in any degree, shall not be *deemed a discovery. (See Odiorne *v.* Winkley, 2 Gallis. 51.) If the inventor of an improvement obtain a patent for the whole machine, the patent, being more extensive than the invention, is void. Woodcock *v.* Parker, 1 Gallis. 439; Whittemore *v.* Cutter, Ibid. 478; Odiorne *v.* Winkley, Ibid. 51.

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3. By the third section, every inventor, before he can obtain a patent, is required to swear, that he is the true inventor or discoverer of the art, machine or improvement, for which he solicits a patent, and to deliver a written description of his invention, and of the manner of using, or process of compounding, it, in such full, clear and exact terms as to distinguish the same from all other things before known, and to enable any person skilled in the art or science of which it is a branch, or with which it is most nearly connected, to make, compound and use the same. And in the case of any machine, he shall fully explain the principle, and the several modes in which he has contemplated the application of that principle, or character, by which it may be distingnished from other inventions; and he is to accompany the whole with drawings and written references, where the nature of the case admits of drawings; or with specimens of the ingredients, and of the composition of matter, sufficient in quantity for the purpose of experiment, where the invention is a composition of matter; which description, signed by himself, and attested by two witnesses, is to be filed in the office of state; and the inventor is moreover to deliver a model of his machine, if the secretary shall deem it necessary. The patentee must describe in his specification, with reasonable certainty, in what his invention consists; otherwise, it will be void for ambiguity. If it be for an improvement in an existing machine, he must, in his specification, distinguish the new from the old, and confine his patent to such parts only as are new; for, if both are mixed up together, and a patent is taken for the whole, it is void. Lowell *v.* Lewis, 1 Mason 182. The taking of the oath is directory to the party; but if, by mistake, the oath is not taken before the issuing of the patent, the patent is not thereby rendered void. Whittemore *v.* Cutter, 1 Gallis. 429.

4. By the fourth section, patentees may assign their rights, and, upon the assignment being recorded in the office of *state, the assignee shall stand in the place of the original inventor, both as to right and responsibility, and so the assignees of assignees in any degree. Where the patentee has assigned an undivided moiety of his patent-right, the action for an infringement of the right should be in the joint names of the patentee and the assignee. Whittemore *v.* Cutter, 1 Gallis. 429. But an assignee of the patent-right, by an assignment, excepting certain places, is not an assignee entitled to sue, within the act. Tyler *v.* Tuel, 6 Cranch 324.

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5. The third section of the act of 1800 (which is a substitute for the fifth section of the act of 1793) declares, that any person who, without the written consent of the patentee, &c., shall "make, devise, use *or* sell," (the words of the fifth section of the act of 1793 were, "make, devise, *and* use or sell") the thing patented, shall forfeit three times the actual damages sustained by the patentee, &c., to be recovered by an action on the case in the circuit court of the United States having jurisdiction thereof. Upon this section, it has been held, that the making of a patented machine, fit for use, and with a design to use it for profit, in violation of the patent-right, is, of itself, a breach of this section, for which an action lies; but where the making only, without a

user, is proved, nominal damages only are to be given for the plaintiff. Whittemore *v.* Cutter, 1 Gallis. 429, 478. If a *user* is proved, the measure of damages is the value of the use during the time of the user. Ibid. But the act gives the plaintiff a right to his actual damages only, and not to a vindictive recompense, as in other cases of tort. Ibid. And neither the price of, nor the expense of making, a patented machine, is a proper measure of damages, in such case. Ibid. The sale of the materials of a patented machine, by a sheriff, upon an execution against the owners, is not a sale which subjects the sheriff to an action, under the third section of the act of 1800. Sawin *v.* Guild, 1 Gallis. 485. In an action on this section, the jury are to find the single damages, and the court are to treble them. Whittemore *v.* Cutter, 1 Gallis. 479.

6. The sixth section authorizes the defendant to plead the general issue, and give this act, and any special matter, in evidence, of which notice in writing may have been given to the plaintiff *thirty days before trial, tending to prove, (1) that the specification does not contain the whole truth relative to the discovery, or [*27 that it contains more than is necessary to produce the described effect, which concealment, or addition, shall fully appear to have been made for the purpose of deceiving the public; (2) or that the patented thing was not originally discovered by the patentee, but had been in use, or had been described in some public work, anterior to the supposed discovery of the patentee; (3) or that he had surreptitiously obtained a patent for the discovery of another person: in either of which cases, judgment shall be rendered for the defendant, with costs, and the patent shall be declared void. Besides the points decided in the principal case in the text (Evans *v.* Eaton), the following are deserving of notice. It is clear, that this section does not include all the matters of defence which the defendant may be legally entitled to make: as, for instance, it does not include the case of the non-existence of the fact of infringement in any shape; the case of an assignment from the plaintiff, or a written license, or purchase from the plaintiff; or that the patentee is an alien, not entitled to a patent; which are clearly bars to the action, upon the very terms of the act, as well as the general principles of law. Whittemore *v.* Cutter, 1 Gallis. 429, 485. So, if the specification do not describe the invention in clear and exact terms, so as to distinguish it from other inventions, but be so ambiguous and obscure, that it cannot be with reasonable certainty ascertained for what the patent is taken, or what it includes, the patent is void for ambiguity; and the fact may be shown in his defence by the defendant. Lowell *v.* Lewis, 1 Mason 182. But if the invention is definitely described in the patent and specification, so as to distinguish it from other inventions before known, the patent is good, although it does not describe the invention in such full, clear and exact terms that a person skilled in the art or science, of which it is a branch, could construct or make the thing; unless such defective description or concealment was with intent to deceive the public. Whittemore *v.* Cutter, 1 Gallis. 429. Lowell *v.* Lewis, 1 Mason 182. In order to defeat a patent, it is not necessary to prove that the invention has previously been in general use, *and generally known to the public. It is sufficient, if it has been pre- [*28 viously known to, and put in use by, other persons, however limited in extent the use or the knowledge of the invention may have been. Bedford *v.* Hunt, 1 Mason 302.

7. The seventh section applies only to the case of patents under state authority, before the constitution of the United States.

8. The eighth section applied only to applications then pending for patents under, the patent act of 1790.

9. The ninth section directs that, in cases of interfering applications, for a patent for the same invention, the same may be referred to arbitrators, chosen by the applicants and the secretary of state, whose award shall be final "as far as respects the granting of the patent;" and if either of the applicants refuse to choose an arbitrator, the patent shall issue to the opposite party. It has been held, that such an award is not conclusive in any other respect than as to the mere issuing of the patent; and that it decides nothing as to the right of invention or other claims of either party, but that either party may contest, in a suit at law, the validity of the patent. Stearns *v.* Barrett, 1 Mason 10.

10. The tenth section provides, that upon oath or affirmation being made before the district judge of the district where the patentee, his executors, &c., reside, that any patent was obtained "surreptitiously, or upon false suggestion" (the words of the act of 1790 are, "surreptitiously by or upon false suggestion"), the district judge may, if the matter appear sufficient, at any time within three years after the issuing of the patent, grant a rule that the patentee show cause why process should not issue against him to repeal the patent; and, if sufficient cause be not shown, the rule shall be made absolute, and the judge shall order process to be issued against such patentee, &c., with costs of suit. And if no sufficient cause shall be shown to the contrary, or if it shall appear that the patentee was not the true inventor or discoverer, judgment shall be rendered by the court for the repeal of the patent; and if the plaintiff fails in his complaint, the defendant shall recover costs.

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1. B. a merchant in New York, wrote to L., a merchant in New Orleans, on the 9th January 1806, mentioning that a ship, belonging to T. & Son, of Portland, was ordered to New Orleans for freight, and requesting L. to procure a freight for her, and purchase and put on board of her 500 bales of cotton, on the owners' account; "for the payment of all shipments on the owners' account, thy bills on T. & Son, of Portland, or me, sixty days sight, shall meet due honor." On the 13th February, B. again wrote to L., reiterating the former request, and inclosing a letter from T. & Son, to L., containing their instructions to L., with whom they afterwards continued to correspond, adding "thy bills on me, for their account, for cotton they order shipped by the Mac, shall meet with due honor." On the 24th July 1806, B. again wrote L. on the same subject, saying, "the owners wished her loaded on their own account, for the payment of which thy bills on me shall meet with due honor, at sixty days sight." L. proceeded to purchase and ship the cotton, and drew several bills on B., which were paid; he afterwards drew two bills on T. & Son, payable in New York, which were protested for non-payment, they having, in the meantime, failed; and about two years afterwards, drew bills on B., for the balance due, including the two protested bills, damages and interest: *Held*, that the letters of the 13th February, and 24th July contained no revocation of the undertaking in the letter of the 9th January, that although the bills on T. & Son were not drawn according to B.'s assumption, this could only effect the right of L., to recover the damages paid by him on the return of the bills, but that L. had still a right to recover on the original guarantee of the debt. It was also *held*, that L., by making his election to draw upon T. & Son, in the first instance, did not thereby preclude himself from resorting to B., whose undertaking was, in effect, a promise to furnish the funds necessary to carry into execution the adventure. Also, *held*, that L. had a right to recover from B., the commissions, disbursements and other charges of the transaction. *Lanusse* v. *Barker*...*101

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1. Note on the laws of Louisania. *Shepherd* v. *Hampton*.....*202

2. If, under the Virginia land-law, the warrant must be lodged in the office of the surveyor, at the time when the survey is made, his certificate, stating that the survey was made by virtue of the governor's warrant, and agreeable to the royal proclamation of 1763, is sufficient evidence, that the warrant was in his possession at that time. *Craig* v. *Radford*.....*594, 597

3. The 6th sec. of the act of Virginia of 1748, entitled, "an act directing the duty of surveyors of lands," is merely directory to the officer, and does not make the validity of the survey depend upon his conforming to its requisitions.....*Id.*

4. A survey, made by the deputy-surveyor, is, in law, to be considered as made by the principal surveyor.....*Id.*

See BILLS OF EXCHANGE, &c., 1, 6: CHANCERY, 1, 2: EJECTMENT, 3: STATUTES OF GEORGIA: STATUTES OF NORTH CAROLINA: STATUTES OF TENNESSEE.

NON-INTERCOURSE.

See ADMIRALTY, 1, 2, 25.

NOTES.

See BILLS OF EXCHANGE, &c.

PATENT.

1. *Quære?* Whether, under the general patent law, improvements on different machines can be comprehended in the same patent, so as to give a right to the exclusive use of the several machines, separately, as well as a right to the exclusive use of those machines in combination? *Evans* v. *Eaton*.....*444

2. However this may be, the act of the 21st of January 1808, ch. 117, "for the relief of Oliver Evans," authorizes the issuing to him of a patent for his invention, discovery and improvements in the art of manufacturing flour, and in the several machines applicable to that purpose.....*Id.*

3. *Quære?* Whether congress can constitutionally decide the fact, that a particular individual is an author or inventor of a certain writing or invention, so as to preclude judi-

cial inquiry into the originality of the authorship or invention.....*Id.*
4. The act of the 21st of January 1808, for the relief of Oliver Evans, does not decide the fact of the originality of his invention, but leaves the question open to investigation, under the general patent law.....*Id.*
5. Under the 6th section of the patent law, ch. 156, if the thing secured by patent had been in use, or had been described in a public work, anterior to the supposed discovery, the patent is void, whether the patentee had a knowledge of this previous use or description, or not.....*Id.*
6. Oliver Evans may claim, under his patent, the exclusive use of his inventions and improvements in the art of manufacturing flour and meal, and in the several machines which he has invented, and in his improvement on machines previously discovered; but where his claim is for an improvement on a machine, he must show the extent of his improvement, so that a person understanding the subject may comprehend distinctly in what it consists.....*Id.*
7. The act for the relief of O. Evans is grafted on the general patent law, so as to give him a right to sue in the circuit court, for an infringement of his patent-rights, although the defendant may be a citizen of the same state with himself.....*Id.*
8. Note on the patent laws. *Appendix, note* II.....*13

See PRACTICE, 18, 19.

PIRACY.

1. A robbery committed on the high seas, although such robbery, if committed on land, would not, by the laws of the United States, be punishable with death, is piracy, under the 8th section of the act of 1790, ch. 36, for the punishment of certain crimes against the United States; and the circuit courts have jurisdiction thereof. *United States* v. *Palmer*.....*610
2. The crime of robbery, as mentioned in the act, is the crime of robbery as recognised and defined at common law.....*Id.*
3. The crime of robbery, committed by a person who is not a citizen of the United States, on the high seas, on board of a ship, belonging exclusively to subjects of a foreign state, or on persons in a foreign vessel, is not piracy, under the act, and is not punishable in the courts of the United States.....*Id.*
4. When a civil war rages in a foreign nation, one part of which separates itself from the old established government, and erects itself into a distinct government, the courts of the Union must view such newly-constituted government as it is viewed by the legislative and executive departments of the government of the United States; if that government remains neutral, but recognises the existence of a civil war, the courts of the Union cannot consider as criminal, those acts of hostility which war authorizes, and which the new government may direct against its enemy.....*Id.*
5. The same testimony which would be sufficient to prove that a vessel or person is in the service of an acknowledged state, is admissible to prove that they are in the service of such newly-created government; its seal cannot be allowed to prove itself, but may be proved by such testimony as the nature of the case admits: And the fact that a vessel or person is in the service of such government may by established otherwise, should it be impracticable to prove the seal.....*Id.*

PLEADING.

1. If an action be brought against an officer making a seizure under the laws of the United States, for a supposed trespass, while the suit for the forfeiture is depending in the United States courts, the fact of such pendency may be pleaded in abatement, or as a temporary bar of the action. If the action is brought, after a decree of condemnation, then that fact may be pleaded as a bar; if after an acquittal, with a certificate of reasonable cause of seizure, then that may be pleaded as a bar. If, after an acquittal, without such certificate, then the officer is without any justification for the seizure, and it is definitively settled to be a tortious act. If, to an action of trespass in a state court for a seizure, the seizing officer plead the fact of forfeiture in his defence, without averring a *lis pendens*, or a condemnation, or an acquittal, with a certificate of reasonable cause of seizure, the plea is bad; for it attempts to put in issue the question of forfeiture, in a state court. *Gelston* v. *Hoyt*.....*246
2. The statute of 1794, ch. 50, § 3, prohibiting the fitting out any ship, &c., for the service of any foreign prince, &c., to cruise against the subjects, &c., of any other foreign prince, &c., does not apply to any new government, unless it has been acknowledged by the United States, or by the government of the country to which such new government previously belonged. And a plea setting up a forfeiture under that statute, in fitting out a ship to cruise against such new state, must aver such recognition, or it is bad.....*Id.*

3. A plea justifying a seizure under the statute of 1794, ch. 50, need not state the particular prince or state, by name, against whom the ship was intended to cruise.....*Id.*
4. A plea justifying a seizure and detention by virtue of the 7th section of the statute of 1794, ch. 50, under the express instructions of the president, must aver that the naval or military force of the United States was employed for that purpose, and that the seizer belonged to the force so employed.....*Id.*
5. To trespass for taking and detaining, and converting property, it is sufficient to plead a justification of the taking and detention; and if the plaintiff relies on the conversion, he should reply it, by way of new assignment.....*Id.*
6. A plea alleging a seizure for a forfeiture as a justification, should not only state the facts relied on to establish the forfeiture, but aver that the property thereby became, and was, actually forfeited, and was seized as forfeited.....*Id.*

PRACTICE.

1. Informal and imperfect proceedings in the district court, corrected and explained in the circuit court. *The Friendschaft* ...*14
2. A bill of lading, consigning the goods to a neutral, though unaccompanied by an invoice or letter of advice, is sufficient evidence to lay a foundation for the introduction of further proof.....*Id.*
3. Spoliation of papers, by the enemy master, will not preclude a neutral claimant from further proof.....*Id.*
4. Prize practice of France, as to further proof.....*Id.* *49
5. Decree in an instance cause affirmed, with damages, at the rate of six per centum *per annum*, on the amount of the appraised value of the cargo (the same having been delivered to the claimant on bail), including interest from the date of the decree of condemnation in the district court. *The Diana*..*56
6. A witness offered to be examined *vivâ voce*, in open court, in an instance cause, ordered to be examined out of court. *The Samuel*.....*77
7. Decree of restitution affirmed in this court, with a certificate of reasonable cause of seizure, in an instance cause, on further proof. *The San Pedro* *78
8. An agreement of the parties, entered on the transcript, stating the amount of damages to be adjudged to one of the parties upon several alternatives (the verdict stating no alternative), not regarded by this court as a part of the record brought up by the writ of error; but a *venire de novo* awarded, to have the damages assessed by a jury, in the court below. *Lanusse* v. *Barker*.....*147
9. A conveyance by a plaintiff 's lessor, during the pendency of an action of ejectment, can only operate upon his reversionary interest, and cannot extinguish the prior lease; if the lease expire, during the pendency of a suit, the plaintiff cannot recover his term, at law, without having it enlarged by the court, and can proceed only for antecedent damages. *Robinson* v. *Campbell*.....* 212
10. Note on the effect of an outstanding title in a third person, in ejectment.....*Id.* *224
11. Libel for a forfeiture of goods imported into the United States, and alleged to have been exported from Bordeaux, in France, and invoiced at a less sum than the actual cost, at the place of exportation, contrary to the 6th section of the collection law, ch. 128; it appeared, that the goods were originally shipped from Liverpool, and were landed at Bordeaux. Restitution decreed, upon the evidence as to the cost of the goods at Bordeaux—the form of the libel excluding all inquiry as to their cost at Liverpool, the place where they were originally shipped, and as to continuity of voyage. *United States* v. 150 *Crates* *232
12. Where a neutral ship-owner lends his name to cover a fraud with regard to the cargo, this circumstance will subject the ship to condemnation. *The Fortuna*.....*236
13. It is a relaxation of the rules of the prize court, to allow time for further proof, in a case where there has been a concealment of material papers.....*Id.*
14. This court has no jurisdiction, under the 25th section of the judiciary act of 1789, ch. 20, unless the judgment or decree of the state court, be a final judgment or decree. A judgment reversing that of an inferior court, and awarding a *venire facias de novo*, is not a final judgment. *Houston* v. *Moore*....*433
15. The captors are competent witnesses upon an order for further proof, where the benefit of it is extended to both parties. *The Anne*.....*435
16. The captors are always competent witnesses, as to the circumstances of the capture, whether it be joint, collusive or within neutral territory.....*Id.*
17. Irregularities on the part of the captors, originating from mere mistake or negligence, which work no irreparable mischief, and are consistent with good faith, will not forfeit their rights of prize.....*Id.*
18. Under the 6th section of the patent law of 1793, ch. 156, the defendant pleaded the general issue, and gave notice that he would prove, at the trial, that the machine for the use of which, without license, the suit was

brought, had been used previous to the alleged invention of the plaintiff, in several places which were specified in the notice, or in some of them, "and also, at sundry other places, in Pennsylvania, Maryland and elsewhere in the United States;" the defendant, having given evidence as to some of the places specified, offered evidence as to others not specified: *Held*, that this evidence was admissible: but that the powers of the court, in such a case, are sufficient to prevent, and will be exercised to prevent, the patentee from being injured by surprise. *Evans* v. *Eaton*.....*454

19. Testimony on the part of the plaintiff, that the persons, of whose prior use of the machine the defendant had given evidence, had paid the plaintiff for licenses to use the machine, ought not to be absolutely rejected, though entitled to very little weight.....*Id.*

20. The circuit courts have no power to set aside their decrees in equity, on motion, after the term at which they are rendered. *Cameron* v. *McRoberts*..... *591

See JURISDICTION.

PRESIDENT.

See ADMIRALTY, 13.

PRIZE.

1. A bill of lading, consigning the goods to a neutral, but unaccompanied by an invoice or letter of advice, is not sufficient evidence to entitle the claimant to restitution; but is sufficient to lay a foundation for the introduction of further proof. *The Friendschaft*.....*14

2. The fact of invoices and letters of advice not being found on board, may induce a suspicion that papers have been spoliated; but even if it were proved, that an enemy master, carrying a cargo chiefly hostile, had thrown papers overboard, a neutral claimant, to whom no fraud is imputable, is not thereby precluded from further proof.....*Id.*

3. A blockade does not, according to modern usage, extend to a neutral vessel, found in port, nor prevent her coming out, with the cargo, which was on board, when the blockade was instituted. *Olivera* v. *Union Ins. Co*.....*194

4. Cases on the subject of licenses collected..... *207

5. A question of proprietary interest and concealment of papers: further proof ordered, open to both parties: on the production of further proof by the claimant, condemnation pronounced. *The Fortuna*.....*237

6. Where a neutral ship-owner lends his name to cover a fraud with regard to the cargo, this circumstance will subject the ship to condemnation.....*Id.*

7. Relaxation of the rules of the court, in allowing further proof, in a case of concealment of papers.....*Id.*

8. A neutral cargo, found on board an armed enemy's vessel, is not liable to condemnation as prize of war. *The Atlanta*.....*409

9. A question of proprietary interest: further proof ordered.....*Id.*

10. It is not competent for a neutral consul, without the special authority of his government, to interpose a claim on account of the violation of the territorial jurisdiction of his country. *The Anne*.....*435

11. *Quære?* Whether such a claim can be interposed even by a public minister, without the sanction of the government, in whose tribunals the cause is pending?.....*Id.*

12. A capture made within neutral territory, is, as between the belligerants, rightful; and its validity can only be questioned by the neutral state.....*Id.*

13. If the captured ship commence hostilities, upon the capture, within neutral territory, she forfeits the neutral protection, and the capture is not an injury for which redress can be sought from the neutral sovereign....*Id.*

14. The district courts of the United States have jurisdiction of questions of prize, and its incidents, independent of the special provisions of the prize act of the 26th June 1812. *The Amiable Nancy*.....*546

15. On an illegal seizure, the original wrongdoers may be made responsible, beyond the loss actually sustained, in a case of gross and wanton outrage; but the owners of a privateer, who are only constructively liable, are not bound to the extent of vindictive damages.*Id.*

16. An item for loss by deterioration of the cargo, not occasioned by the improper conduct of the captors, rejected.....*Id.*

17. The probable or possible profits of an unfinished voyage, afford no rule to estimate the damages, in a case of marine trespass.....*Id.*

18. The prime cost or value of the property lost, and in case of injury, the diminution in value, by reason of the injury, with interest thereon, affords the true measure for estimating damages in such a case.....*Id.*

19. An item for the ransom of the vessel and cargo, which had been subsequently seized by another belligerent (as alleged, for want of papers), of which the vessel had been deprived by the first captors, rejected, under the particular circumstances of the case...*Id.*

See DOMICIL: LICENSE: PIRACY: PRACTICE, 1-4, 15-17: SALVAGE.

SALE.

1. In an action by the vendee, for a breach of the contract of sale by the vendor, in not delivering the article, the measure of damages is the price of the article, at the time of the breach of the contract, and not at any subsequent period. *Shepherd* v. *Hampton*..... *200
2. *Quære?* How far this rule applies to a case, where advances of money have been made by the purchaser, under the contract?.....*Id.*
3. One citizen of the United States has no right to purchase of, or sell to, another, a license or pass from the public enemy, to be used on board an American vessel. *Patton* v. *Nicholson*.....*204

SALVAGE.

1. An American vessel was captured by the enemy, and after condemnation and sale to a subject of the enemy, was re-captured by an American privateer: *Held*, that the original owner was not entitled to restitution, on payment of salvage, unde the salvage act of the 3d March 1800, and the prize act of 26th June 1812. *The Star*.....*78
2. By the general maritime law, a sentence of condemnation completely extinguishes the title of the original proprietor.....*Id.*
3. The British salvage acts reserve the *jus postliminii*, as to vessels of British subjects, even after condemnation, unless they have been, after capture, set forth as ships of war.....*Id.*
4. The statute of the 43 Geo. III., ch. 160, § 39, has no further altered the previous British law, than to fix the salvage at uniform stipulated rates, instead of leaving it to depend upon the length of time the re-captured ship was in the hands of the enemy..*Id.*
5. Neither of the British statutes extend to neutral property.....*Id.*
6. The 5th section of the prize act of 1812, does not repeal any of the provisions of the salvage act of the 3d of March 1800, but is merely affirmative of the pre-existing law. *Id.*
7. By our law, the rule of reciprocity prevails, upon the re-capture of the property of friends.....*Id.*
8. Note on the laws of the different maritime countries of Europe as to recaptures and salvage.....*93
9. Law of Great Britain.....*94
10. Law of France.....*95
11. Law of Spain, Portugal and Holland...*97
12. Law of Denmark and Sweden.....*98
13. Re-captures from pirates.....*99

SPECIFIC PERFORMANCE.

See CHANCERY, 1.

STATUTES OF GEORGIA.

1. The terms "beyond seas," in the proviso or saving clause of the statute of limitations of Georgia, of 1767, are equivalent to, without the limits of the state; and a party who is without those limits, is entitled to the benefit of the exception. *Murray* v. *Baker*..*541

STATUTES OF NORTH CAROLINA.

1. The state of North Carolina, by her act of cession of the western lands, of 1789, recited in the act of congress of 1790, accepting that cession, and by her act of 1803, ceding to Tennessee the right to issue grants, parted with her right to issue grants for lands within the state of Tennessee, upon entries made before the cession. *Burton* v. *Williams*.....*529
2. But, it seems, that the holder of such a grant may resort to the equity jurisdiction of the United States courts for relief.....*Id.*
3. Under the cession act of North Carolina, of 1789, ratified by the act of congress of 1790, the United States held the domain of the vacant lands in Tennessee, subject to the right which North Carolina retained of perfecting the inchoate titles created under her laws.....*Id.*
4. The act of North Carolina of 1803, granted to Tennessee, irrevocably, the power of perfecting titles to land reserved to North Carolina, by the cession act, and was assented to by congress, in their act of 1806.....*Id.*
5. The act of congress of 1806 does not violate the cession act.....*Id.*

STATUTES OF TENNESSEE.

1. By the compact of 1802, settling the boundary line between Virginia and Tennessee, and the laws made in pursuance thereof, it is declared, that all claims and titles to lands derived from Virginia, or North Carolina or Tennessee, which have fallen into the respective states, shall remain as secure to the owners thereof, as if derived from the government within whose boundary they have fallen, and shall not be prejudiced or affected by the establishment of the line. Where the titles both of the plaintiff and defendant in ejectment were derived under grant from Virginia, to lands which fell within the limits of Tennessee, it was held, that a prior settlement right thereto, which would, in equity, gave the party a title, could not be asserted as a sufficient title, in an action of ejectment, brought in the circuit court of Tennessee. *Robinson* v. *Campbell*.....*212

2. Although the state courts of Tennessee have decided that under their statutes (declaring an elder grant founded on a junor entry to be void), a junior patent founded on a prior entry will prevail at law against a senior patent, founded on a junior entry; this doctrine has never been extended beyond cases within the express purview of the statute of Tennessee, and cannot apply to titles deriving all their validity from the laws of Virginia, and confirmed by the compact between the two states.....*Id.*

3. The general rule is, that remedies in respect to real property are to be pursued according to the *lex loci rei sitæ*. The statutes of the two states are to be construed as giving the same validity and effect to the titles in the disputed territory, as they had, or would have, in the state by which they were granted, leaving the remedies to enforce such titles to be regulated by the *lex fori*.....*Id.*

4. In this case, it was held, that the statute of limitations of Tennessee was not a good bar to the action, there being no proof that the lands in controversy were always within the original limits of Tennessee, and the statute could not begin to run, until it was ascertained by the compact of 1802, that the land fell within the jurisdictional limits of Tennessee.....*Id.*

STATUTES OF VIRGINIA.

See LOCAL LAW, 2, 3.

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TRADE WITH THE ENEMY.

See LICENSE, 2.

TREATY.

1. G. C., born in the colony of New York, went to England in 1738, where he resided until his decease: and being seised of lands in New York, he, on the 30th November, 1776, in England, devised the same to the defendant, and E. C., as tenants in common, and died so seised, on the 10th December 1776; the defendant and E. C., having entered, and becoming possessed, E. C., on the 3d December 1791, bargained and sold to the defendant all his interest; the defendant and E. C. were both born in England, long before the revolution; on the 22d March 1791, the legislature of New York, passed an act, to enable the defendant to purchase lands, and to hold all other lands which he might then be entitled to, within the state, by purchase or descent, in fee-simple, and to sell and dispose of the same, in the same manner as any natural-born citizen might do; the defendant, at the time of the action brought, still continued to be a British subject: *Held*, that he was entitled, under the 9th section of the treaty of 1794, between the United States and Great Britain, to hold the lands so devised to him by G. C., and transferred to him and transferred to him by E. C. *Jackson ex dem. The People of New York* v. *Clarke*..*1

See ALIEN.

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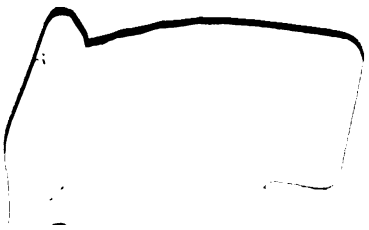
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